IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 604

DIVISION 1287 OF THE AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, ET AL., *Appellants*

v.

STATE OF MISSOURI, *Appellee*

On Appeal From the Supreme Court of Missouri

JURISDICTIONAL STATEMENT

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AUTHORITIES CITED

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JURISDICTIONAL STATEMENT

Appellants appeal from the final judgment of the Supreme Court of Missouri, en banc, entered on October 8, 1962, affirming as modified the decree of the Circuit Court of Jackson County, Kansas City, Missouri.

OPINIONS BELOW

The opinion of the Missouri Supreme Court is not yet reported (*infra*, pp. 3a-42a). No opinion was written by the Circuit Court of Jackson County. The opinion of a three-judge federal district court in a proceeding pertaining to the same controversy as the instant one, expressing that court's decision to abstain from adjudication of the federal questions presented on this appeal in deference to initial state determination, is not yet reported (*infra*, pp. 45a-54a).

JURISDICTION

The Missouri Supreme Court affirmed as modified an injunction issued by the Circuit Court of Jackson County restraining a strike in a proceeding brought in accordance with the procedure prescribed by a Missouri statute known as the King-Thompson Act. The final judgment of the Missouri Supreme Court was entered on October 8, 1962 (R. 282). Notice of appeal was filed in that court on October 18, 1962 (R. 283). The jurisdiction of this Court to review by appeal the judgment of the Missouri Supreme Court is conferred by 28 U.S.C. § 1257(2).

STATUTES INVOLVED

The King-Thompson Act (Ch. 295, Rev. Stat. Mo., 1949) is set out in full in Appendix D (*infra*, pp. 55a-65a). Relevant provisions of the Labor Management Relations Act, 1947 (61 Stat. 316, 29 U.S.C. § 141, *et seq.*) are set out in Appendix E (*infra*, pp. 66a-72a).

QUESTIONS PRESENTED

1. Whether the King-Thompson Act, which establishes a special type of compulsory fact-finding procedure applicable to labor disputes in privately owned public utilities and which makes "unlawful" "any strike or concerted refusal to work for any utility or for the state after any plant, equipment or facility has been taken over by the state. . . , as a means of enforcing any demands against the utility or against the state," is in conflict with and pre-empted by the Labor Management Relations Act, 1947.

2. Whether the King-Thompson Act, by prohibiting a public utility strike without substituting a compensating equivalent for it, offends substantive due process in violation of the Fourteenth Amendment of the United States Constitution and imposes involuntary servitude in violation of the Thirteenth Amendment of the United States Constitution.

STATEMENT

After an impasse had been reached in collective bargaining negotiations between appellant Division 1287 of the Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America (herein called the Union) and Kansas City Transit, Inc. (herein called the Company), the transit employees voted to and went on strike to cause the employer to accede to their terms. Upon the basis of the threatened strike, the Governor of Missouri invoked the King-Thompson Act and took possession of the property of the Company; after the strike was called, an injunction to restrain its continuance was sought and obtained in accordance with the injunctive procedure of the King-Thompson Act. The federal

questions presented on this appeal were first raised in the Circuit Court of Jackson County by motion to dismiss (R. 12-18), in the answer (R. 200-201), and at the trial (R. 180), and were thereafter urged on appeal to the Missouri Supreme Court (Br. pp. 2, 12-46).[1] The underlying subsidiary facts, relevant to appellants' claim that the King-Thompson Act is invalid on federal grounds, may be summarized as follows:

A. The Interstate Business of Kansas City Transit, Inc.

The Company is a Missouri corporation with its principal office and place of business at Kansas City, Missouri. It transports passengers by bus in the States of Kansas and Missouri. It operates under a certificate of convenience and necessity issued by the Public Service Commission of Missouri and a like certificate issued by the Kansas State Corporation Commission. (R. 20-21.)

The Company has "one line that operates exclusively in the State of Kansas; . . . certain lines that operate exclusively in the State of Missouri; and then the rest of the lines are interstate operating between both states" (R. 21). The Company's annual revenue received from the bus transportation of passengers approximates $8,600,000 (R. 22). Of this sum, 77 percent is derived from transporting passengers wholly within the State of Missouri, 7 percent is derived from transporting passengers wholly within the State of Kansas, and 15 percent is derived from transporting passengers between Missouri and Kansas (R. 22). On

[1] "Br." refers to the brief filed by appellants in the court below. All briefs in the court below and a letter submitted in lieu of a reply brief have been certified by the clerk of the court below and transmitted to the clerk of this Court.

a normal work day the average number of passengers carried by the Company on the total system is about 150,000 (R. 22). Of this number, 115,000 travel exclusively within Missouri, 10,500 travel exclusively within Kansas, and 24,500 travel interstate between points in Kansas and Missouri (R. 24-25).

The total round trip route miles of the Company's passenger transit system are about 496 miles (R. 25). 415 of these route miles are located in Missouri, and 81 in Kansas (R. 25). Of the total round trip mileage of 496, 150 round trip miles constitute continuous interstate routes running between Kansas and Missouri, 330 round trip miles constitute routes running exclusively within Missouri, and one route of 16.78 round trip miles runs exclusively within Kansas (R. 26-28, 44). The Company owns 401 buses (R. 28). It operates 104 on the interstate routes, 234 on routes exclusively within Missouri, and eight on the route exclusively within Kansas (R. 28-29).

Of the Company's total employment of 950 persons, 817 are within the bargaining unit represented by the Union (R. 31, 45). Of the employees within the bargaining unit, 640 are bus drivers and 170 are maintenance employees (R. 28, 30); 665 live in Missouri and 150 in Kansas (R. 110). The bus drivers are part of the transportation department comprised of two divisions, both located in Kansas City, Missouri; the maintenance employees are part of the maintenance department, comprised of a garage and shop, each located in Kansas City, Missouri (R. 29-30). Whether the bus driver operates an interstate route, a Kansas route, or a Missouri route, he reports to work and begins his journey at one of the two divisions at Kansas City, Missouri (R. 29-30). Buses are not assigned to a par-

ticular route but operate interchangeably on all routes; maintenance of buses is similarly not segregated; a maintenance employee can work on any bus (R. 30-31).

The Company annually spends about $1,450,000 for fuels, materials, and supplies (R. 34-35). Much of these have an extrastate origin (R. 35). All of the 401 buses owned by the Company were manufactured in states other than Kansas or Missouri and were delivered to the Company in Missouri from other states (R. 35-36).

The National Labor Relations Board has found, and the Company in the proceeding before the Board has admitted, that the Company "is engaged in commerce within the meaning of the National Labor Relations Act." *Kansas City Public Service Co.*, 47 NLRB 1, 2.

B. The Labor Dispute and the Prohibition of the Strike

The employees represented by the Union in collective bargaining consist basically of bus operators, mechanics, service men, and cleaners and janitors (R. 98). The National Labor Relations Board on February 19, 1943 certified the Union as the representative of these employees and others within a defined bargaining unit, and the Union has been their representative from that time (R. 98-99, def. ex. 4). The Company and the Union entered into their first collective bargaining agreement in 1943, and agreements between them have since existed (R. 99).

The most recent agreement was for a term from November 1, 1959 through October 31, 1961 (R. 100, def. ex. 5, p. 3). On August 15, 1961, the Company notified the Union of its desire to terminate the agreement (R. 101). On August 30, 1961, the Union noti-

fied the Company of its desire to negotiate changes in the agreement, and identified the changes it proposed (R. 100). The Union sent copies of its notification to the Federal Mediation and Conciliation Service and to the Missouri State Board of Mediation (R. 101). On September 29, 1961, the Union filed a notice of dispute with the Federal Mediation and Conciliation Service, Missouri State Board of Mediation, and the Kansas Department of Labor (R. 101). The sixty-day notice of proposed changes sent to the Company and the thirty-day notice of dispute sent to the federal and state agencies were dispatched in accordance with the requirements of section 8(d)(1) and (3) of the Labor Management Relations Act, 1947.

Negotiations between the Company and the Union began on September 19, 1961 (R. 101). An impasse was reached about October 13, 1961 (R. 101-102). The subjects in dispute were wages, vacations with pay, group insurance, pensions, disability allowances, sick leave, a different system of work day for all maintenance employees, a profit sharing plan, a cost of living plan, and others (R. 102). On October 19, 1961, the Federal Mediation and Conciliation Service began to attempt to mediate the dispute and negotiations since then have been conducted with its assistance (R. 102).

On October 30, 1961, the Chairman of the Missouri State Board of Mediation attended the negotiation session scheduled for that day and he continued thereafter to sit in on the negotiations (R. 103, 72-73). On October 31, 1961, the Governor of Missouri wired the Union urging it to "accept the services of the full membership of the State Board of Mediation forthwith to hear the most important issues and make recommendations for settlement" (def. ex. 6). On

November 1, 1961, the Union wired its response, informing the Governor of its willingness to "accept the mediation efforts" of the state agency "provided that such efforts do not include hearings which result in recommendations" (def. ex. 7). On November 6, 1961, the Chairman of the State Board notified the Company and the Union of his intention to assemble the full Board, and on November 8, 1961, the Board convened (R. 103, 76-77). Orally and in writing, at the meeting of November 8, the Union stated that, as ground rules for a successful proceeding, the State Board should act in a mediatory capacity only, "without any hearing of a public nature" and without "recommendations, public or otherwise" (R. 103-105, 77-80, def. exs. 8, 9). The Union "has always felt that negotiations cannot be properly conducted in the newspapers or in the public" (R. 104). The State Board declined to commit itself to the method of proceeding requested by the Union, and the Union then withdrew from participation in the meeting of November 8 (R. 104-105, 77-80, def. exs. 8-9). Thereafter, on November 11, 1961, the State Board issued a public written recommendation for settlement, proposing a wage increase only, all other unresolved issues to be dropped (R. 81-83).

Meanwhile, on October 31 and November 1 and 2, an impasse having been reached in negotiations and the Company having refused to arbitrate the unsettled issues (R. 106; 76), the Union conducted a strike vote by secret ballot (R. 106). Of the 817 employees eligible to vote, 775 cast ballots, 681 voting for the strike, 74 against, and two ballots were blank (R. 106). The 42 who did not vote failed to do so because they "were home sick in bed or in the hospital or out of town on vacations" (R. 106).

Section 295.180 of the King-Thompson Act provides that the Governor of Missouri is authorized "to take immediate possession" of a public utility "after his investigation and proclamation that there is a threatened or actual interruption of the operation of such public utility as the result of . . . a threatened or actual strike, . . . and that the public interest, health and welfare are jeopardized, and that the exercise of such authority is necessary to insure the operation of such public utility. . . ." *Infra*, pp. 62a-63a. In accordance with this provision, on November 13, 1961, the Governor issued a proclamation that the threatened strike against the Company required him to exercise his authority to take possession of it in order to assure its operation (def. ex. 1). On the same date, the Governor issued Executive Order No. 1 stating that "I hereby take possession of the plants, equipment, and all facilities of the Kansas City Transit, Inc., located in the State of Missouri, for the use and operation by the State of Missouri in the public interest, effective at 11:59 o'clock, P.M., Central Standard Time, Monday, November 13, 1961" (def. ex. 2.) Still the same day, the Governor issued Executive Order No. 2, designating the Chairman of the Missouri State Board of Mediation as his agent to take possession (def. ex. 3). Section 295.200.1 of the King-Thompson Act makes "unlawful," after a utility has been "taken over," "any strike or concerted refusal to work . . . as a means of enforcing any demands against the utility or against the state." *Infra*, pp. 63a-64a.

At midnight November 13, 1961, the Union struck the Company and picketed its various premises (R. 106-107). The strike and picketing were discontinued in the evening of November 15, 1961, as a result of the

issuance by the Circuit Court of Jackson County, Missouri, of a temporary restraining order, continued in effect after trial pending final decision (R. 189), enjoining "any work stoppage, refusal to work and strike against the State of Missouri or Kansas City Transit, Inc." (R. 10, 107). During its continuance the strike and picketing had been peaceful (R. 107).

On two occasions previous to 1961, the Governor of Missouri, pursuant to the King-Thompson Act, took possession of the Company as a result of a threatened strike by the Union (R. 108-109). The period of seizure on the first occasion lasted from April 1950 to December 11, 1950, and on the second from November 6, 1957 to March 6, 1958 (R. 109). No actual strike occurred at either previous time after possession was taken (R. 109-110).

C. The Character of the Possession of the Company Taken by the State of Missouri

Possession of the Company consisted of the performance of no acts other than the delivery to its President of the Governor's Proclamation and Executive Orders No. 1 and 2 (R. 56-57). Executive Order No. 2 provides in part that "All rules and regulations of the aforesaid utility governing the internal management and organization of the company, and its duties and responsibilities, shall remain in force and effect throughout the term of operation by the State of Missouri" (def. ex. 3).

The employees of the Company are not, and will not be, employees of Missouri (R. 57, 92-97). The employees are not paid by Missouri; Missouri does not contribute to their social security or unemployment compensation benefits; Missouri does not pay their

workmen's compensation claims (R. 58-60). These payments are made by the Company (*ibid.*). Missouri does not direct the employees as to what to do or where to report for work (R. 61-62); it does not hire, discharge, or discipline them (R. 62); it does not control any aspect of the employment relationship or consult with the Company concerning it (R. 62).

Missouri does not and is not authorized to expend any of the Company's money (R. 61-62). Missouri does not possess the Company's bank accounts, sign its checks, or collect its revenue (R. 63-64). No reports are made to Missouri, and none have been requested, concerning the Company's receipt of its funds (R. 64). Missouri does not make purchases for the Company or pay its bills (R. 64-65). No property of the Company was actually conveyed, transferred, or otherwise turned over to Missouri (R. 65).

Missouri does not participate in the management of the Company; Missouri is not consulted by the Company's Board of Directors or officers as to the conduct of the business (R. 65-66). Management of the Company remains exclusively with its officers and Board of Directors (R. 66). There has been no change of any kind in the conduct of the business by the Company (R. 66-67).

D. The Character of the Actual and Apprehended Jeopardy to the "Public Interest, Health and Welfare" as a Result of the Strike Against the Company

During the two-day strike, the Mayor of Kansas City, Missouri, called for group riding in private cars (R. 160), and maximum occupancy of taxicabs (R. 162). Most people got to work (R. 150). The judgment of responsible police officials on the flow of traffic

was that "'We had a few problems as we usually do but they were straightened out quickly. We had traffic supervisors in the field all over the city watching the situation. They reported that everything seemed to be moving smoothly. The principal tie-ups occurred again briefly in the vicinity of 31st and Main Streets and at 31st and The Paseo but we had enough men assigned to those areas that we got things moving quickly. We kept extra traffic patrolmen on duty'" (R. 178-179).

In answer to the question, "Would you say, sir, that the primary economic effect [of a transit strike] would be upon retail sales in the downtown area of Kansas City?" (R. 167), the Mayor of Kansas City, Missouri, replied (R. 168):

> That is definitely correct. It would be advantageous to shopping centers; it would certainly hurt the hard core of the city which is known as downtown Kansas City, our large stores doing a retail business. I do not think that a transit strike would in anyway affect distribution or wholesale in any fashion, only in minor ways. [See also, R. 124-125, 126-127, 129-134, 139.]

The Mayor further stated that "Police stations would continue to operate; hospitals would continue to operate; fire stations would continue to operate . . ." (R. 168-169). Approximately normal functioning of public utilities like light, gas, and telephone could be expected (R. 169). And the Mayor concluded that industrial plants, barring inconvenience, would operate substantially normally (R. 169).

E. The Injunction Issued by the Circuit Court and Its Affirmance by the Missouri Supreme Court

The petition for injunction was filed with the Circuit Court of Jackson County on November 15, 1962 (R. 1-9). The temporary restraining order enjoining the continuance of the strike was entered the same day (R. 9-10). Trial of the prayer for a temporary injunction was set for November 27, 1962 (R. 10), and on that day appellants filed their motion to dismiss (R. 12-18). Trial was held on November 27 and 28 (R. 12, 98). On November 28, the temporary restraining order was continued in effect pending further order (R. 189). On December 7, appellants filed their answer (R. 198-201). On December 22, the parties stipulated that the evidence received at the preceding trial "may be considered by the court on both the temporary and permanent injunction" (R. 191). On February 12, 1962, the Circuit Court entered its decree adjudging that appellants "be . . . permanently enjoined and restrained from continuing, inciting, supporting and participating in the work stoppage, refusal to work and strike against the State of Missouri" (R. 192). On appeal the Missouri Supreme Court on October 8, 1962 adjudged that the decree "be modified so that the trial court retains jurisdiction of the cause, and as modified, be in all things affirmed, and stand in full force and effect . . ." (R. 282, *infra*, p. 1a).[2]

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[2] Not sought or suggested by the parties or *amici curiae*, the court below *sua sponte* modified the judgment to state "that the trial court retains jurisdiction of the cause. . . ." Retention of jurisdiction by the trial court was ordered "so that it may modify its decree with changing facts and conditions . . ." (*infra*, p. 42a). The court below stated that, upon a showing that changed circumstances had eliminated the "emergency," appellants could apply to the Governor of Missouri to release the utility from seizure and apply to the trial court to modify the judgment if the Governor

THE QUESTIONS ARE SUBSTANTIAL

1. The question whether the King-Thompson Act conflicts with and is preempted by the Labor Management Relations Act, 1947, was before this Court in *Local No. 8-6, Oil, Chemical & Atomic Workers Union* v. *Missouri*, 361 U.S. 363. The Court in that case did not reach the merits of the question because it concluded that the controversy had been mooted. In dissenting from this disposition, Mr. Chief Justice Warren, Mr. Justice Black, and Mr. Justice Brennan stated that the "wrongfulness in holding the case moot is emphasized by our belief that the state court was plainly without any jurisdiction over this controversy unless this Court wants to overrule *Amalgamated Association S.E.R.M.C.E.* v. *Wisconsin Employment Relations Board*, 340 U.S. 383, and adopt the views of the three

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denied relief (*infra*, pp. 31a-32a, 33a). Retention of jurisdiction for this purpose of course does not detract from the finality of the judgment. "Familiar equity procedure assures opportunity for modifying or vacting an injunction when its continuance is no longer warranted." *Milk Wagon Drivers Union* v. *Meadowmoor Dairies*, 312 U.S. 287, 298. Explicit retention of jurisdiction for this purpose is common. *System Federation* v. *Wright*, 364 U.S. 642. Retention of jurisdiction by courts "for future modifications of their decrees . . . has . . . not been considered inconsistent with the finality of the original decrees." *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 307, n. 14; see also, *St. Louis, Iron Mountain & So. Ry. Co.* v. *Southern Express Co.*, 108 U.S. 24; *cf. Republic Natural Gas Co.* v. *Oklahoma*, 334 U.S. 62, 70, n. 3. Were the inherent limitation upon the permanence of any injunction operating *in futuro* to deprive the injunction of its status as a final judgment, every permanent state injunction would be unappealable to this Court, a manifestly untenable conclusion. In this case the federal questions "have reached a definitive stop" (*Republic Natural Gas Co.* v. *Oklahoma*, 334 U.S. 62, 71); as the case comes here, "the federal question is the controlling question; 'there is nothing more to be decided' ". *Pope* v. *Atlantic Coast Line R. Co.*, 345 U.S. 379, 382.

dissenters in that case. We would follow that holding and reverse this case on the merits." 361 U.S. at 372.

The King-Thompson Act was passed in 1947. During the fifteen years since its enactment seizure has been invoked nine times to bar employees of public utilities from striking to enforce their demands in collective bargaining (*infra*, p. 43a). Throughout this time all negotiations involving public utility employees have been conducted by their unions under the disability of the pervasive threat of seizure precluding recourse to a strike. And, throughout this time, to say the least, grave doubt as to the validity of this actual or apprehended exertion of state power has existed as the opinion of the Chief Justice and Justices Black and Brennan signifies. It is indispensable that all concerned with the enforcement of the King-Thompson Act—the public utility employees, the employers for whom they work, the unions which represent them, and the public—finally know whether their affairs are being ordered in accordance with a valid enactment.

As the Chief Justice and Justices Black and Brennan state, the King-Thompson Act can stand only if this Court overrules *Amalgamated Association*. In *Amalgamated Association* this Court invalidated the Wisconsin Public Utility Anti-Strike Law because it conflicted with the Labor Management Relations Act, 1947. The Wisconsin Act made it "unlawful for any group of employees of a public utility employer acting in concert to call a strike or to go out on strike, or to cause any work stoppage or slowdown which would cause an interruption of an essential service" (§ 111.62). The same conflict which invalidated the Wisconsin Act nullifies the Missouri Act. Thus:

(a) Section 295.200 of the King-Thompson Act makes "unlawful" "any strike or concerted refusal to work for any utility or for the state after any plant, equipment, or facility has been taken over by the state . . . , as a means of enforcing any demands against the utility or against the state." The section could not more bluntly identify its point of conflict with the National Act. It prohibits a strike as a means of enforcing demands. As the Court said of the Wisconsin Act in *Amalgamated Association*, so it may be said with precise parity of the King-Thompson Act, "It would be sufficient to state that the Wisconsin Act, in forbidding peaceful strikes for higher wages in industries covered by the Federal Act, has forbidden the exercise of rights protected by § 7 of the Federal Act." 340 U.S. at 398.

(b) The validity of the King-Thompson Act is not saved by labelling it "strictly emergency legislation. . . ." *Infra*, pp. 18a, 30a, 32a-33a; *Missouri* v. *Local No. 8-6, Oil, Chemical and Atomic Workers Union*, 317 S.W. 2d 309, 321. Appeal to the so-called emergency nature of the statute is based on the view that this Court left open this ground for exercising state authority in the utility field. It did not. In *Amalgamated Association* the validity of the Wisconsin Act was defended upon the following basis: In 1947 "Congress enacted special procedures to deal with strikes which might create national emergencies"; this shows a "congressional intent to carve out a separate field of 'emergency' labor disputes"; since "Congress acted only in respect to 'national emergencies.' . . : Congress intended, by silence, to leave the states free to regulate 'local emergency' disputes." 340 U.S. at 393-394. This Court rejected this argument on alternative grounds:

first, the Wisconsin Act is not "emergency" legislation, and, second, it would make no difference even if it were. As to the first ground the Court stated that (340 U.S. at 393-394):

> However, the Wisconsin Act before us is not "emergency" legislation but a comprehensive code for the settlement of labor disputes between public-utility employers and employees. Far from being limited to "local emergencies," the act has been applied to disputes national in scope, and application of the act does not require the existence of an "emergency."

As to the second ground the Court stated that (340 U.S. at 394):

> In any event, congressional imposition of certain restrictions on petitioners' right to strike, far from supporting the Wisconsin Act, shows that Congress has closed to state regulation the field of peaceful strikes in industries affecting commerce. * * * And where, as here, the state seeks to deny entirely a federally guaranteed right which Congress itself restricted only to a limited extent in case of national emergencies, however serious, it is manifest that the state legislation is in conflict with the federal law.

Thus this Court plainly held that an "emergency" caused by a strike does not justify state regulation of it. That this was an alternative ground for decision does not in the least detract from its authoritativeness. It is old law that "where there are two grounds, upon either of which an appellate court may rest its decision, and it adopts both, 'the ruling on neither is obiter, but each is the judgment of the court, and of equal validity with the other.'" *United States* v. *Title Insurance & T. Co.*, 263 U.S. 472, 486. There can hardly

be a legal difference between a strike interrupting surface transportation in Milwaukee, as in *Amalgamated Association*, and a strike interrupting surface transportation in Kansas City, as in this case.

(c) Nor is the King-Thompson Act saved by the parallel plea that it "is not a comprehensive code for the settlement of labor disputes in utilities as the Wisconsin Act appeared to be." *Infra*, p. 18a; *Missouri v. Local No. 8-6, Oil, Chemical and Atomic Workers Union*, 317 S.W. 2d 309, 321. First of all, whether comprehensive or cursory, the state enactment falls if it conflicts with the National Act. In any event, the King-Thompson Act is not meaningfully less comprehensive than its Wisconsin counterpart. Its very declaration of policy asserts that "the state's regulation of labor relations affecting such public utilities is necessary in the public interest" (§ 295.010, *infra*, p. 55a). It imposes requirements with respect to the duration and renewal of collective bargaining agreements in public utilities (§§ 295.090, 295.100, *infra*, pp. 58a-59a). It provides penalties where the State Mediation Board has found "that any public utility has refused to bargain collectively in good faith with its employees over the terms and conditions of employment" (§ 295.200.5, *infra*, p. 64a). It requires that representatives "shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other" (§ 295.140, *infra*, p. 61a). And, most particularly, it establishes a special type of compulsory fact-finding procedure applicable to labor disputes in public utilities which itself conflicts with the National Act (§ 295.120, *infra*, p. 60a).

Thus, the essence of the federal scheme for mediation and conciliation is voluntarism—that the mediation

and conciliation methods employed shall be acceptable to the parties and not forced on them.[3] The King-Thompson Act proceeds on an opposite tack. It provides for a "public hearing panel" (§ 295.120.1, *infra*, p. 60a); the panel is appointed and acts regardless of the wishes of the employer or the union or both not to designate members on it and not to participate in the hearing (§§ 295.120.2, 295.160, *infra*, pp. 60a, 61a-62a); the panel is to "hold and complete public hearings on the specific changes so requested, to the contract, agreement or understanding"; and "the panel shall file with the governor, in writing, a report setting forth a statement of the controversy, a resume of the evidence submitted to it and its recommendations based thereon" (§ 295.150, *infra*, p. 61a).

Thus, in contrast to the voluntarism which underlies federal statutory mediation and conciliation, the King-Thompson Act is based on compulsory hearing and fact-finding plus recommendation of settlement terms. As the Court of Appeals for the First Circuit stated in invalidating a Massachusetts statute similarly based on an activist view of the role of mediation and conciliation, so here, the "obvious [state] statutory purpose is to coerce agreement by invoking official action to mold public opinion with respect to a labor dispute to the end of bringing the pressure of public opinion to bear to force a settlement. This is quite contrary to the na-

[3] As explained by William E. Simkin, Director of the Federal Mediation and Conciliation Service, "It should be made clear at the outset that we do not and never have conceived of mediation as a decision-making process. Our sole reliance is on persuasion. We seek no powers other than the right and obligation to attempt to persuade. This concept obviously includes the right of any company or any union to decide against any particular suggestion that may be made." Simkin, *Role of Government in Collective Bargaining*, 50 LRR 126, 129 (1962).

tional policy not to compel agreement but instead only to encourage voluntary agreements freely arrived at after 'good faith' bargaining between the parties. The conflict between the state and federal policy is obvious." *General Electric Co.* v. *Callahan*, 294 F. 2d 60, 67 (C.A. 1).

(d) A "main" difference identified to save the validity of the King-Thompson Act is that "the Wisconsin Act provided for compulsory arbitration while the King-Thompson Act does not." *Missouri* v. *Local No. 8-6; Oil, Chemical and Atomic Workers Union*, 317 S.W. 2d, 309, 321; *infra*, p. 36a. But the absence of compulsory arbitration worsens the conflict with the National Act. Both statutes prohibit a utility strike and both therefore geld collective bargaining by depriving the union of the capacity to exert economic pressure to back its demands. The Wisconsin Act at least sought to rectify the imbalance it created by providing compulsory arbitration as a substitute for the strike. While this nullifies the freedom of the parties to work out the terms of their agreement for themselves, it does not subject the employees to the practical necessity of accepting the employer's terms for lack of means to induce him to yield more favorable conditions. And, as between terms impartially determined by a disinterested body and terms which an employer can unilaterally dictate because he can act without apprehension of a strike, the former more nearly harmonizes with the federal objective of "restoring equality of bargaining power between employers and employees" (LMRA, Title I, § 1, ¶4). And so, in prohibiting the strike without providing a compensating equivalent to substitute for it, the King-Thompson Act worsens the conflict with the National Act.

(e) The reason overridingly stressed to support the validity of the King-Thompson Act is that the strike is prohibited only in conjunction with possession of the utility by the State. *Infra*, pp. 27a-34a. Utilization of seizure to signal prohibition of the strike does not save the statute. Congress canvassed and rejected seizure as an appropriate regulatory method.

This Court settled the question in *Youngstown Sheet & Tube Company* v. *Sawyer*, 343 U.S. 579, when it held that the President had no constitutional power to seize the steel mills to avert a national emergency, and premised this conclusion in significant part on the fact that Congress in the Taft-Hartley Act had withheld seizure authority from the President even in national emergency strikes. Writing for the Court, Mr. Justice Black explained that (*id.* at 586):

> Moreover, the use of the seizure technique to solve labor disputes in order to prevent work stoppages was not only unauthorized by any congressional enactment; prior to this controversy, Congress had refused to adopt that method of settling labor disputes. When the Taft-Hartley Act was under consideration in 1947, Congress rejected an amendment which would have authorized such governmental seizures in cases of emergency. Apparently it was thought that the technique of seizure, like that of compulsory arbitration, would interfere with the process of collective bargaining. Consequently, the plan Congress adopted in that Act did not provide for seizure under any circumstances. Instead, the plan sought to bring about settlements by use of the customary devices of mediation, conciliation, investigation by boards of inquiry, and public reports. In some instances temporary injunctions were authorized to provide cooling-off periods. All this failing, unions were left free to strike after a secret vote by employees

as to whether they wished to accept their employers' final settlement offer.

In agreement, Mr. Justice Frankfurter observed that "Congress in 1947 was again called upon to consider whether governmental seizure should be used to avoid serious industrial shutdowns. Congress decided against conferring such power generally and in advance, without special Congressional enactment to meet each particular need" (*id.* at 598). As Mr. Justice Burton stated, "Collective bargaining, rather than governmental seizure, was to be relied upon." *Id.* at 657; see also *id.* at 639, n. 8 (Mr. Justice Jackson), *id.* at 662-666 (Mr. Justice Clark).

The power to seize which Congress withheld from the President to avert a national emergency it did not grant to a State Governor to avert a local emergency. No less than other short cuts to industrial peace, seizure "was rejected by Congress as being inconsistent with its policy in respect to enterprises covered by the federal Act, and not because of any desire to leave the states free to adopt it." *Amalgamated Association*, 340 U.S. at 395. As summarized by Senator Taft, the architect of the Labor Management Relations Act, 1947, upon whose views this Court strongly relied in *Amalgamated Association*, "We did not feel that we should put into law, as a part of the collective-bargaining machinery, an ultimate resort to compulsory arbitration, *or to seizure*, or to any other action. We feel that it would interfere with the whole process of collective bargaining." 340 U.S. at 395, n. 21 (emphasis supplied).

The incompatibility of seizure with the National Act is especially apparent here. For seizure here is wholly token in character, involving nothing but paper

possession of the utility, and having as its consequence and objective nothing but prohibition of the strike (*supra*, pp. 10-11). As the court below itself explained on a previous occasion when the very utility presently involved was taken over by the State pursuant to the King-Thompson Act (*Rider* v. *Julian*, 365 Mo. 313, 282 S.W. 2d 484, 494-495 (1955)):

> The possession which . . . [the Governor's agent] assumed was largely declaratory in nature. It was proclaimed by the governor and again by . . . [the agent] . . ., but actually nothing was done about it. * * * The State's possession was not real or visible, nor was the transit company ousted from its "actual and continuous occupancy or exercise of full dominion" over its premises. * * *
>
> It is apparent from the record, and we so hold, that possession of . . . [the Governor's agent] and the state was not intended to be and was not in fact actual possession. Insofar as the possession needs to be identified by name, it might be called a legal possession or a nominal and technical possession. It was more or less the assertion of the right to possession which did not, in this case, ripen into exclusive or actual possession.

In any event, whether nominal or real, seizure designed as an instrument for use in a labor dispute cannot be invoked compatibly with the National Act. When seizure is triggered by a strike, is aimed at stopping the strike, and has a duration limited by settlement of the labor dispute out of which the strike grows, the seizure to which the State resorts is a labor relations device in conflict with collective bargaining backed by the right to strike as guaranteed by federal law. This is forbidden to the State by the Supremacy Clause.

(f) As least three times since this Court's decision in *Amalgamated Association* bills have been introduced,

which Congress has by vote affirmatively refused to enact, designed to overrule that decision by amending the National Labor Relations Act to authorize state laws prohibiting or regulating strikes by public utility employees. Rejection by Congress took place in 1954,[4] 1958,[5] and 1959.[6] Congress has thus ratified the rule of *Amalgamated Association* and again affirmed that public utility employees may not be subjected to state laws which deny or curtail the right to strike or to bargain collectively as guaranteed by federal law.[7]

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[4] S. 2650, 83d Cong., 2d Sess. (1954); recommendations of President Eisenhower in his message to Congress (H. R. Doc. No. 291, 83d Cong., 2d Sess., Jan. 11, 1954); Letter of President Eisenhower to Senator Smith of March 26, 1954 (see S. Rep. No. 1211, 83d Cong., 2d Sess., 8); S. Rep. No. 1211, 83d Cong., 2d Sess., 2, 3, 17, 18; 100 Cong. Rec. 5836, 5383, 6202.

[5] S. 3692, 85th Cong., 2d Sess. (1958); Hearings before subcommittee of Senate Labor Committee, 85th Cong., 2d Sess., 465 ff, 1444 ff; 104 Cong. Rec. 9984-9995.

[6] 105 Cong. Rec. 6733-6740.

[7] The decree of the Circuit Court of Jackson County enjoined "*the* work stoppage, refusal to work and strike *against the State of Missouri*" (R. 192, emphasis supplied). Appeal was taken to the Missouri Supreme Court from that decree (R. 193), the only one in existence and the only one from which an appeal could be taken. Relying upon the terms of the decree prohibiting the strike "against the State of Missouri," and stating that appellants do not assert a right to strike against the State of Missouri, the court below seems to say that appellants have not taken issue with the single matter which the decree enjoins (*infra*, pp. 24a-25a, 34a).

This is the sheerest casuistry. The strike which was enjoined could be denominated a strike "against the State" only in the sense that the State had taken nominal possession of the utility. The injunction against the strike was valid only if the seizure upon which it was predicated was valid. And appellants could not at every stage have contested the validity of the seizure, and hence the validity of the injunction, more forcefully than they did. Appellants' motion to dismiss explicitly stated that "Section 295.180 of said Law [the King-Thompson Act], providing that a public utility may be seized on the terms and conditions therein

2. We have set forth the factors showing that federal law supersedes the King-Thompson Act at greater length than might ordinarily be appropriate for the

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set forth is in conflict with the Labor Management Relations Act, including but not limited to Section 7 and Section 13 thereof" (R. 15). Appellants' answer explicitly incorporated the grounds stated in the motion to dismiss (R. 201). At the trial, appellants adduced the evidence showing the token character of the seizure (*supra*, pp. 10-11), as appears on the face of the opinion of the court below (*infra*, pp. 19a-20a), a showing compatible only with an attack upon the validity of the seizure. On appeal, the token character of the seizure was set out at length by appellants (Br. pp. 8-9), the "Points Relied On" explicitly stated that "Utilization of the seizure device to prohibit a public utility strike does not save the validity of the state enactment" (Br. p. 14), and this point was thereafter elaborated beyond mistake (Br. pp. 32-34), as appears on the face of the opinion of the court below (*infra*, p. 38a). Upon examination of the full record of the state proceeding, the three-judge federal district court, in staying the proceeding before it involving this controversy, recognized that the "permanent injunction was granted [by the Circuit Court of Jackson County] in a judgment *upholding the seizure and enjoining the strike*" (*infra*, p. 47a, emphasis supplied); it decided to abstain in deference to initial determination by the Missouri Supreme Court, recognizing that on the appeal pending before that court the validity of the seizure and injunction had been put in issue and would be adjudicated (*infra*, pp. 45a-54a).

Candid recognition of the obvious thus compels the conclusion that the seizure and the injunction predicated on it are one and the same, and that an attack upon the seizure is indistinguishably an attack upon the injunction which takes its sole force and efficacy from the seizure. The court below cannot realistically treat the injunction as if it forbade a strike by governmental employees against the Government, nor tax appellants for declining to be drawn into a fight on that artificial battleground (*infra*, pp. 28a-29a). The transit employees in this case are plainly not the employees of "any State or political subdivision thereof." *Cf.*, *Amalgamated Association*, 340 U.S. at 398, n. 25. Notwithstanding seizure, they retain protection against discharge for union activity, the utility continues to be obliged to bargain with their union, and any questions of representation involving them are still determinable by the National Labor Relations Board. They are obviously not public employees in any genuine sense.

purpose of a Jurisdictional Statement. We have done so in the belief that this Court may wish to consider summary reversal of the judgment. Supersession of the King-Thompson Act was briefed and argued to this Court on the merits in *Local 8-6, Oil, Chemical & Atomic Workers Union* v. *Missouri*, 361 U.S. 363. In that case Mr. Chief Justice Warren, Mr. Justice Black, and Mr. Justice Brennan expressed their conviction that the King-Thompson Act could stand only if *Amalgamated Association* were overruled. No tenable distinctions relevant to displacement by paramount federal authority exist between the King-Thompson Act and the Wisconsin Public Utility Anti-Strike Law invalidated on conflict grounds in *Amalgamated Association*. Adherence to *Amalgamated Association* makes summary reversal of the judgment below appropriate.

If the judgment is not summarily reversed, but probable jurisdiction is noted, the Court should advance the case. This Court in *Local No. 8-6* decided that the state injunction becomes moot when it expires upon vacation of seizure. Vacation of seizure follows the settlement of the underlying economic dispute.[8] Accordingly, appellants are in the dilemma that (a) settlement may quickly moot the state injunction and thereby deprive them of the power to contest the validity of the King-Thompson Act which is at the heart of this proceeding, (b) until there is a settlement the employees are required to work under the unimproved standards of employment presently prevailing which petitioners believe to be seriously inadequate,

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[8] Section 295.180 of the King-Thompson Act provides in part that the seized "utility, plant, equipment or facility shall be returned to the owners thereof as soon as practicable after the settlement of said labor dispute. . . ." *Infra*, p. 63a.

and (c) any settlement reached during seizure fails to "reflect the strength and bargaining power" of the employees acting as a group[9] because they are disabled from withholding their labor in concert to support their economic demands. Expedition is therefore essential to minimize the pressure of the dilemma appellants face in their effort to vindicate their federal rights.

3. The King-Thompson Act offends substantive due process in violation of the Fourteenth Amendment of the United States Constitution. The vice stems from the statute's prohibition of a public utility strike without providing a compensating equivalent to substitute for the strike. The occasion for prohibition of the strike is seizure of the utility upon the Governor's determination that an actual or threatened strike jeopardizes the public interest, health and welfare. Barring superseding federal law or the independent operation of the Commerce Clause, one may grant a valid state interest in safeguarding the community from imminent jeopardy caused by interruption of utility services. But protection of that interest, if it can justify it at all (see *Wolff Packing Co.* v. *Court of Industrial Relations*, 262 U.S. 522), can justify abolition of the strike only if a compensating equivalent is substituted for the strike. It can not justify relegation of the public utility worker to economic servility by depriving him of the right to strike and giving him nothing in place of it. As stated by Mr. Justice Brandeis, the legislature, "while limiting individual and group rights of aggression and defense, may substitute processes of justice for the more primitive method of trial by combat." Dissenting in *Duplex Printing Press Co.* v. *Deering*,

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[9] *J. I. Case Co.* v. *N.L.R.B.*, 321 U.S. 332, 338.

254 U.S. 443, 488, cited with approval, *U. A. W.* v. *W. E. R. B.*, 336 U.S. 245, 252, 259; *Thornhill* v. *Alabama*, 310 U.S. 88, 104. But a fatal defect in what Missouri has done is that it has not substituted "processes of justice." It has forbidden the fight, and left the field to the employer. A statute is arbitrary and capricious, and therefore unconstitutional, when it sacrifices the employees' interest in a fair wage and working conditions by depriving them, without any compensating equivalent, of their only effective weapon in the competition over the division of the joint product of capital and labor.

The same consideration shows the statute's imposition of involuntary servitude in violation of the Thirteenth Amendment of the United States Constitution. For to prohibit utility employees from striking, without substituting a compensating equivalent for the strike, brings about precisely the situation where "the master can compel and the laborer cannot escape the obligation to go on," with the result that "there is no power below to redress and no incentive above to relieve a harsh overlordship or unwholesome conditions of work." *Pollack* v. *Williams*, 322 U.S. 4, 17-18. In the industrial world of the twentieth century this is involuntary servitude. It is no answer to say that the statute does not prohibit the worker from quitting. He can quit only if there is other work he can find. And the employee with substantial service with the employer can quit only if he is willing to surrender his equity in his seniority and start from scratch with another enterprise. The freedom to quit is therefore hollow. The hard fact is that employees who are prohibited from striking are compelled by economic exi-

gency to stay on the job on the employer's terms. This is involuntary servitude in today's world.[10]

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[10] The court below states that appellants' claims based upon the Thirteenth and Fourteenth Amendments were not presented to the trial court (*infra*, pp. 39a-41a). The statement is spurious. In *Missouri* v. *Local No. 8-6, Oil, Chemical & Atomic Workers Union*, 317 S.W. 2d 309, the court below rejected the Fourteenth Amendment claim on the ground that the "only limitation upon an employees' strike or a company's lockout is if the public interest is endangered," so that the "King-Thompson Act does not abolish the right of utility employees to strike, but only subordinates the right to the public interest" (317 S.W. 2d at 321, 323); it rejected the Thirteenth Amendment claim on the ground that the King-Thompson Act "is directed against a strike or a concerted refusal to work and has nothing to do with one or more quitting work of their own volition" (*id.* at 325). In the present case, in the face of this prior ruling, appellants' motion to dismiss in the trial court *inter alia* assigned the Thirteenth and Fourteenth Amendments as grounds for the invalidity of the King-Thompson Act (R. 14-17). At the trial upon the preliminary injunction (later stipulated to constitute the trial upon the permanent injunction, R. 191), appellants' counsel in his concluding argument stated in part (R. 180):

> If your Honor please, as of course Your Honor is aware, the Supreme Court of Missouri, in State of Missouri versus Local No. 8-6, Oil, Chemical and Atomic Workers International Union has passed for its purposes on the King-Thompson Act. It has ruled that the King-Thompson Act is not preempted by the Taft-Hartley Act. It has also ruled it is not vulnerable to attack on the 1st and 14th Amendment grounds. It would be pointless for us to argue to Your Honor in view of that decision that these questions are still open before you so on those questions I simply want to state we are preserving those points [illegible] do not argue them to Your Honor.

In their answer appellants averred *inter alia* that the King-Thompson Act "abridges federal rights conferred by the First, Thirteenth, and Fourteenth Amendments of the United States Constitution," and incorporated in the "answer all the allegations and grounds stated by them in their motion to dismiss" (R. 201). On appeal to the court below, appellants in their "Points Relied On" stated that "Prohibition of a public utility strike, without substituting a compensating equivalent for it, offends substantive due process"

CONCLUSION

For the reasons stated, the judgment should be summarily reversed on the authority of *Amalgamated Association S.E.R.M.C.E.* v. *Wisconsin Employment*

(Br. p. 15) and "results in involuntary servitude" (Br. p. 16), and these points were elaborated in detail (Br. pp. 41-46). In these circumstances the notion that the Thirteenth and Fourteenth Amendment claims were not properly presented is utterly untenable. A state court may not avoid deciding federal questions and thus defeat the jurisdiction of this Court by putting forth nonfederal grounds of decision which are without fair or substantial support. *Staub* v. *Baxley*, 355 U.S. 313; *Konigsberg* v. *State Bar of California*, 353 U.S. 252, 254-258; *Arnold* v. *Panhandle & Santa Fe Ry. Co.*, 353 U.S. 360, 361.

The patent insubstantiality of the position is illustrated by the statement of the court below that, in the "Points Relied On" set out in the brief on appeal pertaining to "substantive due process," "No constitutional provision is cited by number" (*infra*, p. 39a). Yet, prior to the enumeration of the "Points Relied On," appellants' brief to the court below stated *inter alia* that "this brief is confined to showing that the King-Thompson Act is invalid upon the ground that (1) it is in conflict with and preempted by the Labor Management Relations Act, 1947, and that (2) it abridges federal rights conferred by the First, Thirteenth and Fourteenth Amendments of the United States Constitution" (Br. p. 12). Following the enumeration of the "Points Relied On," in the part of the brief dealing with denial of "substantive due process," the Fourteenth Amendment was cited by number three times (Br. pp. 41-44). Finally, in a brief confined to urging the invalidity of a state statute on federal grounds, it is to the last degree unimaginable that any state court of last resort would not know that a claim based on "substantive due process" invokes the Fourteenth Amendment of the United States Constitution.

Vindication of federal rights cannot be frustrated by tortured "resort to an arid ritual of meaningless form." *Staub* v. *Baxley*, 355 U.S. 313, 320. In any event, despite the claimed procedural inadequacy of the presentation of the Thirteenth and Fourteenth Amendment claims, the court below nevertheless did in this case decide them adversely to appellants on the merits on the authority of its previous decision in *Missouri* v. *Local No. 8-6, Oil, Chemical & Atomic Workers Union*, 317 S.W. 2d 309 (*infra*, pp. 41a-42a).

Relations Board, 340 U.S. 383. In the alternative, probable jurisdiction should be noted and the case advanced.

Respectfully submitted,

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November, 1962.

APPENDIX A

Cir. Ct. No. 639507

No. 49377

IN THE SUPREME COURT OF MISSOURI

SEPTEMBER SESSION, 1962

STATE OF MISSOURI, *Respondent*,

vs.

DIVISION 1287 OF THE AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA; Loren Hargus, Pearl R. Finch, James L. Grimes, Lorrain B. Firkins, James Smirl, Delbert H. Lord, Victor H. Stueve, Earnest E. O'Neill, Wm. V. Mitchell, Oliver D. Pace, Edward J. Arens, Lewis A. Copple, Lester F. Parker, James T. Strohm, Donald Rigby and Vincent Annello, each individually as an officer of Division 1287 of the Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, et al., *Appellants*.

Appeal from the Circuit Court of Jackson County.

Now at this day come again the parties aforesaid, by their respective attorneys, and the court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Circuit Court of Jackson County rendered, be modified so that the trial court retains jurisdiction of the cause, and as modified, be in all things affirmed, and stand in full force and effect; and that the said respondent recover against the said appellants costs and charges herein expended and have therefor execution.

(Opinion filed)

STATE OF MISSOURI—SCT.

I, MARION SPICER, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the September Session thereof, 1963, and on the 8th day of October, 1962, in the above entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson City, this day of 1962.

Clerk.

APPENDIX B

IN THE SUPREME COURT OF MISSOURI

EN BANC

SEPTEMBER SESSION, 1962

No. 49 377

STATE OF MISSOURI, *Respondent*,

vs.

DIVISION 1287 OF THE AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, ET AL., *Appellants*.

On Appeal from the Circuit Court of Jackson County.

Honorable J. Donald Murphy, *Judge*

Division 1287 of the Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, an unincorporated, voluntary association of persons with headquarters at 1913 Tracy Avenue in the City of Kansas City, Missouri, defendants in the above entitled cause in the Circuit Court of Jackson County, Missouri, have appealed from a decree and permanent injunction entered in said cause on February 12, 1962, in favor of the State of Missouri. The judgment in said cause concluded, as follows: "NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the defendants, and all of the persons to whom notice of this order of injunction may come, be and they are hereby permanently enjoined and restrained from continuing, inciting, supporting and participating in the work stoppage, refusal to work and strike *against the State of Missouri.*". (Italics ours.) See Section 295.200, subsections (1) and (6) RSMo 1959. Appellants seek to reverse the judgment and obtain a declaration that the

King-Thompson Act, Chapter 295 RSMo 1959, under which the action was instituted, is unconstitutional and void in its entirety under the Federal Constitution, although only portions of the mentioned Act are before the Court for construction on this appeal.

The cause was in equity and it was tried by the court without the aid of a jury. Under Supreme Court Rule 73.01(b), applicable in such cases, it is provided that "all fact issues upon which no specific findings are made shall be deemed found in accordance with the result reached."

The case presents the issue as to whether the police power of the State may be exercised in an emergency and pursuant to state statutes to take over and maintain the operation of the public transportation system of a great city when the public interest, health and welfare of the State is jeopardized as the result of the sudden interruption and discontinuance of such service by reason of a strike by the employees of the transportation company against their employer. Appellants concede this is the issue in that they say: "Appellants basic position is that, *irrespective of the existence or non-existence of jeopardy by state standards*, the state procedure itself is beyond the power of the State to impose, and appellants' fundamental objective is to be free from its applicability at all. • • • In this posture, where the question goes to the validity of fastening the state procedure onto the litigant at all, existence of the power to act must first be decided." (Italics ours.)

The transportation company is not a party to this action. This suit was instituted by the State of Missouri against the defendants after the State had taken possession and control of the transportation facilities of the transportation company. The basis of the proceeding is that the employees of the Company by a concerted refusal to work for and under the supervision of the State, after the Company's equipment and transportation facilities had been taken over by the State, have violated the law of

the State. The State obtained a temporary restraining order, which was subsequently followed, after hearing, submission and argument, by a permanent injunction, and from this judgment the defendants, as stated, have appealed.

The petition was filed on November 15, 1961, pursuant to the provisions of certain state statutes referred to as the King-Thompson Act, Chapter 295 RSMo 1959. This Act is entitled "An Act to provide for the mediation of labor disputes in public utilities; to create a board of mediation and to provide for the qualifications, powers, duties, compensation of the members of such board; to provide for the seizure and operation of public utilities by the state in order to insure continuous operation, to provide for the enforcement of this act and to prescribe penalties for any violation of this act." The mentioned Act has been before this Court for consideration on several previous occasions. See State ex rel. State Board of Mediation v. Pigg, 362 Mo. 798, 244 S.W.2d 75; State v. Local No. 8-6, Oil, Chemical & Atomic Workers International Union, AFL-CIO, Mo. Sup., 317 S.W.2d 309, vacated by the United States Supreme Court on the ground that the controversy had become moot (80 S.Ct. 391, 361 U.S. 363); Rider v. Julian, 365 Mo. 313, 282 S.W.2d 484. In this connection also see 29 U.S.C.A., Chapter 7, Sec. 152(2) defining the term "employer" under the Federal Act *as not applying to a state*. Of course, there is no question that the Federal labor legislation, 29 U.S.C.A., Sec. 141, et seq., in question here, encompassing as it does all industries and utilities "affecting commerce," applies to a privately owned public utility whose business and activities are carried on wholly within a single state, as well as it does to those that operate interstate. Consolidated Edison Company v. National Labor Relations Board, 305 U.S. 197.

The essential provisions of the King-Thompson Act here in controversy, are Secs. 295.010, 295.180 and

295.200(1) and (6) RSMo 1959. These sections are, in part, as follows: Section 295.010 "Labor relations affecting public utilities — state policy. It is hereby declared to be the policy of the state that heat, light, power, sanitation, transportation, communication, and water are *life essentials of the people*; that the possibility of labor strife in utilities operating under governmental franchise or permit or under governmental ownership and control is a threat to the welfare and health of the people; that utilities so operating are clothed with public interest; * * *." (Italics ours.) A similar declaration of the public policy of this State is announced in the Public Service Commission Act by Sections 386.310, 386.570 and 386.580 RSMo 1959. Also see State v. Local No. 8-6, etc., supra, 317 S.W.2d 309, 316 (7, 8).

Section 295.180 RSMo 1959, in part, provides that "Should either the utility or its employees refuse to accept and abide by the recommendations made pursuant to the provisions of this chapter * * * or in the event that neither side has given notice to the other of an intention to seek a change in working conditions, and there occurs a lockout, strike or work stoppage which, in the opinion of the governor, *threatens to impair the operation of the utility so as to interfere with the public interest, health and welfare*, then and in that case he is authorized to take immediate possession of the plant, equipment or facility for the use and operation by the state of Missouri in the public interest." (Italics ours.) (As we shall subsequently see, the Governor of the State acted under this provision of the statutes and took possession of that portion of the plant, equipment and transportation facilities of the Kansas City Transit, Inc., located exclusively in the State of Missouri.)

Section 295.200(1) RSMo 1959 provides: "It shall be unlawful for any person, employee, or representative as defined in this chapter to call, incite, support or participate in any strike or concerted refusal to work for

• • • the state *after any plant, equipment or facility has been taken over by the state under this chapter,* as means of enforcing any demands against the utility or against the state." (Italics ours.) This particular statute must be read and construed together with Section 295.210 of the same chapter, as follows: "No employee shall be required to render labor or service without his consent; nor shall anything in this chapter be construed to make the quitting of his labor or services by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service without his consent."

Section 295.200(6) RSMo 1959 further provides: "The courts of this state shall have power to enforce by injunction or other legal or equitable remedies any provision of this chapter or any rule or regulation prescribed by the governor hereunder."

As stated, the cause being in equity and having been tried before the court without the aid of a jury, we review the cause de novo and pursuant to Supreme Court Rule 73.01(d) providing, in part, that "The appellate court shall review the case upon both the law and the evidence as in suits of an equitable nature. The judgment shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

Briefly, some of the facts shown by the record are that the Kansas City Transit, Inc., (hereinafter referred to as the Company) operates a transportation system for passengers by bus in the States of Kansas and Missouri. It operates under a Certificate of Convenience and Necessity issued by the Public Service Commission of Missouri and a like certificate issued by the Kansas State Corporation. The Company's annual revenue received from bus transpotration is approximately $8,600,000. Of this sum 77 per cent is derived from transporting pas-

sengers wholly within the State of Missouri, 7 per cent from transporting passengers wholly within the State of Kansas and 15 per cent for transporting passengers between Missouri and Kansas. On a normal work day the number of passengers carried by the Company on the total system is approximately 150,000 persons. Of this number 115,000 travel exclusively in Missouri, 10,500 exclusively in Kansas and 24,500 travel interstate between points in Kansas and Missouri. The Company owns 401 busses and operates 234 on routes exclusively within the State of Missouri. The Company employs 950 persons and 817 are within the bargaining unit represented by the defendant Union. Of the employees within the bargaining unit 640 are bus drivers and 170 are maintenance employees; 665 live in Missouri. The Company annually spends about $1,450,000 for fuels, materials and supplies. All of the 401 busses owned by the Company were manufactured in states other than Kansas or Missouri and delivered to the Company in Missouri from other states. Prior to the difficulties in question here, the National Labor Relations Board had found that the Kansas City Transit, Inc. is engaged in commerce within the meaning of the National Labor Relations Act. Kansas City Public Service Co., 47 NLRB 1, 2. The NLRB has certified the Union as the representative of the employees within its bargaining unit and the most recent labor agreement was approved for a term from November 1, 1959 through October 31, 1960.

On August 15, 1961, the Company notified the Union of its desire to terminate the then existing agreement. On August 30, 1961, the Union notified the Company of its desire to negotiate changes in the agreement and identified the changes it proposed. The evidence shows the basic issues in dispute between the Union and the Company to be substantially as follows: "Wages, of course, were in dispute; vacations with pay; group insurance; pensions; disability allowances; sick leave; a

different system of work day for all maintenance employees; a profit sharing plan; a cost of living plan; * * * runs, for example, in transportation; minimum guarantees; extra man's guarantee; bonus for drivers who would go a full year without an avoidable accident." The Union sent copies of its desired changes to the Federal Mediation and Conciliation Service and to the Missouri State Board of Mediation.

As indicated, the sixty-days' notice of proposed changes was sent to the Company and the thirty-day notice of dispute was sent to the Federal and State agencies. See 29 U.S.C.A. 158(d)(1) and (3); "Sec. 8(d)(1) and (3) of the Labor Management Relations Act, 1947." On October 19, 1961, the Federal Mediation and Conciliation Service began an attempt to mediate the dispute, and negotiations, since then, have been conducted with its assistance. However, the Union refused to accept the mediation services of the Missouri State Board of Mediation upon that Board's refusal to confine its services strictly to mediation efforts and not to submit recommendations for settlement, nor to publicize its meetings, or permit the attendance of third persons at any meetings. Ultimately, the negotiations between the Company and the Union reached an impasse and the Company refused to arbitrate the unsettled issues. A secret strike vote was taken, with 681 members favoring a strike, and a strike against the Company became effective at midnight on November 13, 1961. Picket lines were immediately established and continued until the evening of November 15, 1961.

Prior to the strike the Federal Mediation and Conciliation Service had cooperated fully with the State agencies having similar duties, including the Missouri State Board of Mediation. When it appeared that a strike was imminent, effective at midnight on November 13, 1961, the Governor of the State of Missouri issued a Proclamation to the effect that the contemplated strike threatened to interrupt the mass transportation operations *in Missouri* of the Kan-

sas City Transit, Inc.; that after investigation, it was his opinion the public interest, health and welfare were jeopardized as the result of the impending interruption of the public transportation system *in the City of Kansas City, Missouri,* and it was necessary that he exercise the authority vested in him by Chapter 295, and particularly Section 295.180 RSMo 1959, to insure the operation *in Missouri* of the facilities of the Kansas City Transit, Inc., a public utility. On the same day the Governor of the State of Missouri issued his Executive Order in words and figures as follows:

"To the Secretary of State:

"Whereas, there is a labor dispute existing between the Kansas City Transit, Inc., a public utility furnishing public passenger transportation service in the State of Missouri, and Division 1287 of the Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, recognized bargaining agent of certain of the employees of the Kansas City Transit, Inc.; and Whereas, as a result of such labor dispute there is a threatened strike on the part of the employees *in Missouri* of the Kansas City Transit, Inc., who are members of Division 1287 of the Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, which threatens the effective operation *in Missouri* of the Kansas City Transit, Inc., a public utility; and Whereas, in my opinion such threatened strike threatens to interrupt the operation *in Missouri* of the Kansas City Transit, Inc.; and Whereas, in my opinion *the public interest, health and welfare are jeopardized;* and Whereas, after investigation, I, John M. Dalton, Governor of Missouri, by Executive Proclamation dated the 13th day of November, 1961, proclaimed:

"(1) That the continued operation of the Kansas City Transit, Inc., a public Utility, is threatened as the result of a labor dispute.

"(2) That interruption of the operation of the Kansas City Transit, Inc., a public utility, is threatened as the result of a threatened strike on the part of employees of the Kansas City Transit, Inc., who are members of Division 1287 of the Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America.

"(3) That the public interest, health and welfare are jeopardized as the result of the threatened interruption of the operation of such public utility.

"(4) That the exercise of the authority vested in me by Chapter 295, and particularly Section 295.180, of the Revised Statutes of Missouri, 1959, is necessary to insure the operation in Missouri of the Kansas City Transit, Inc., a public utility.

"NOW, THEREFORE, I, JOHN M. DALTON, Governor of the State of Missouri, by virtue of the authority vested in me by Chapter 295, and particularly Section 295.180, of the Revised Statutes of Missouri, 1959, do hereby order as follows:

"I hereby take possession of the plants, equipment, and all facilities of the Kansas City Transit, Inc., *located in the State of Missouri, for the use and operation by the State of Missouri in the public interest*, effective at 11:59 o'clock P.M., Central Standard Time, Monday, November 13, 1961.

S/ JOHN M. DALTON
Governor."

(All italics ours.)

The order was duly served on the Kansas City Transit, Inc., as stated, and a further order, effective November 13, 1961, at 11:50 p.m., was promulgated, in part, as follows, to wit:

"(1) That Daniel C. Rogers, Chairman of the Missouri State Board of Mediation, acting as my agent, is hereby

authorized and directed to take possession of the plants, equipment and all facilities of the Kansas City Transit, Inc., in the State of Missouri or such parts of each of said plants, equipment and facilities as may be necessary for the purpose of carrying out the provisions of this Order, and to effect my Proclamation and Executive Order No. 1 declaring the public interest, health and welfare jeopardized, in order to insure that the said utility above mentioned is effectively operated in the interest of the people of this State to the end that they may have the benefit of necessary and essential public utility services.

"(2) Said Daniel C. Rogers shall exercise the aforesaid authority as my agent forthwith, and he shall continue to exercise the aforesaid authority as my agent until and unless otherwise directed by me.

"(3) All rules and regulations of the aforesaid utility governing the internal management and organization of the company, and its duties and responsibilities, shall remain in force and effect throughout the term of operation by the State of Missouri.

"(4) This Order shall take effect at 11:59 P.M., Central Standard Time, November 13, 1961.

"Done this 13th day of November, 1961.

S/ JOHN M. DALTON
Governor"

The record shows this was the third time that the plant, property and transportation facilities of the mentioned Company had been seized by the State of Missouri on account of a work stoppage by reason of a threatened strike by the employees against the Company. The dates of the previous seizures and the previous periods of operation by the State being, as follows: Seized April 29, 1950 and operated until December 11, 1950; seized November 6, 1957 and operated until March 6, 1958. Appendix A and Appendix B attached to respondent's brief show a record

of other seizures and the operations under the Act in Missouri.

As stated, the strike was to begin at midnight on November 13, 1961, and the Union struck the Company at that time. The contract had expired October 31, 1961. The seizure was declared effective as of one minute before the strike was to become effective (11:59 p.m.). Thus the strike had been *called* against the *Company* before seizure. Thereafter, the officers and members of defendant Union refused to operate the transportation facilities of the Company after its physical properties, plant and operating facilities were taken possession of and placed in the control of the State of Missouri. The strike previously called went into effect *after* seizure by the State and a concerted refusal to work for the State was *supported* and *participated in* by the defendants-appellants. As a result, no mass transportation was provided in the city and the present suit was instituted by the State on November 15, 1961, praying an injunction against the Union, its officers and members from continuing, inciting, supporting and participating in the work stoppage and refusal to work for and under the supervision of the State of Missouri in the operation of the mass transportation facilities of the Company. See Sections 295.200(1) and (6) and 295.210.

The petition charged that "such action on the part of the union and officers in calling, inciting, supporting and participating in said strike and concerted refusal to work for the State of Missouri" was unlawful under Chapter 295 RSMo 1959, and especially Section 295.200(1) thereof. We find it unnecessary to further review the detailed allegations and prayers of the State's petition for an injunction against the defendants, or to detail the provisions of the temporary restraining order and order to show cause, as entered on said date, nor do we find it necessary to review in detail the provisions of defendants' motion to dismiss the petition, or the detailed provisions of the

subsequent answer filed by the defendants on December 7, 1961.

Defendants' motion to dismiss plaintiff's petition, as filed November 27, 1961, in part, stated: "The defendants state that Chapter 295 Revised Statutes of Missouri, 1949, and especially Sections 295.180 and 295.200 of said Chapter 295 are unconstitutional and invalid and all actions taken thereunder by the Governor of Missouri and Daniel C. Rogers are unlawful, invalid and without any force or effect for the reasons herein set forth and are in derogation of the rights, privileges and immunities granted to all members of the defendant Amalgamated and guaranteed by the Constitution of the United States in Article I Section 8 and Article VI of said Constitution, and the Thirteenth and Fourteenth Amendments of the Constitution of the United States." The motion to dismiss was incorporated in the answer by reference. With reference to defendants' answer, it is sufficient to say that appellants' brief summarizes the grounds upon which the defendants defended the State's said action in the circuit court, as follows, to wit: "(a) The King-Thompson Act is in conflict with and preempted by the Labor Management Relations Act, 1947. (b) The King-Thompson Act abridges federal rights conferred by the First, Thirteenth and Fourteenth Amendments of the United States Constitution. (c) As applied in this case, the King-Thompson Act (*i*) operates extraterritorially, and therefore conflicts with the constitutional requirement that a State confine its authority within its own borders; and (*ii*) directly regulates interstate commerce, and therefore offends the Commerce Clause of the United States Constitution independently of implementing legislation by Congress. [And] (d) The actual or threatened strike against the Company did not jeopardize the 'public interest, health and welfare' within the meaning of the King-Thompson Act."

In reference to point (d), supra, plaintiff's petition alleged "That upon taking posession of the plants, equip-

ment and facilities of the Company by John M. Dalton, Governor of the State of Missouri, the employees and defendants herein have continued the labor dispute aforesaid, and on November 14, 1961, said employees and defendants herein failed and refused, and still fail and refuse, to perform work or labor for and *on behalf of the State of Missouri* in the furnishing of the transportation services aforesaid through the plants, equipment and facilities of The Company to the patrons of said company and to the people generally in the state of Missouri; that thus and thereby has been caused an actual interruption of the operation of the transportation services, as aforesaid, of the public utility, Kansas City Transit, Inc.: that the interruption of the furnishing of such transportation services through the plants, equipment and facilities of The Company and the refusal of the employees to perform work and labor for and on behalf of the State of Missouri in the furnishing of such transportation service has jeopardized and threatened the public interest, health and welfare of the State of Missouri and of the inhabitants thereof." (Italics ours.) The defendants' answer to plaintiff's petition contained among others, the following allegations: "It is specifically denied that any threatened or actual strike jeopardizes and/or threatens or jeopardizes and/or threatened the public interest, health and welfare of the State of Missouri and of the inhabitants thereof. • • • Answering the allegations of paragraph 14, defendants aver that the employees have struck, and desire to strike, in furtherance of their collective bargaining demands made upon Kansas City Transit, Inc., and that defendants support and participate in such strike action. *Defendants deny that any such strike action is a strike against or a refusal to work for the state of Missouri.*"

In their brief filed in this Court appellants have further explained that " 'Grounds (a) and (b) have been heretofore decided adversely to appellants' position by this Court in *Missouri v. Local No. 8-6, Oil, Chemical & Atomic*

Workers Union, 317 S.W. 2d 309, vacated as moot, 361 U.S. 363. Grounds (c) and (d) are undetermined by and open under the latter decision. However, on the procedure to expedite the appeal sought by this motion, appellants would drop grounds (c) and (d) and confine their appeal to grounds (a) and (b). The expedited appeal would thus be limited to urging this Court to overrule its prior decision and would not urge reversal on grounds not comprehended by and considered in the prior decision. *In short, appellants on this procedure withdraw grounds (c) and (d) and urge only grounds (a) and (b).*'" (Italics ours.) Appellants further point out that, after the appeal from the decree in this case had been taken, appellants alternatively moved this Court "either (1) to summarily affirm the judgment on the authority of this Court's decision in *Missouri* v. *Local No. 8-6, Oil, Chemical & Atomic Workers Union*, 317 S.W. 2d 309, vacated as moot, 361 U.S. 363, or (2) to expedite the appeal by submitting it on briefs without oral argument, briefs to be simultaneously served within thirty days from the date of the order granting the motion to expedite the appeal." In pursuance to said request this Court, on April 9, 1962, entered its order refusing to summarily affirm the judgment of February 12, 1962, but granted leave "to submit appeal on briefs without oral argument," which was done.

While this Court refused to summarily affirm the judgment of the trial court in this case on the written request of appellants on the authority of this Court's decision in State of Missouri v. Local No. 8-6, etc., supra, 317 S.W. 2d 309, vacated as moot by the United States Supreme Court in 80 S. Ct. 394, 361 U.S. 363, it does not necessarily follow that the opinion of this Court in that case, as reported in 317 S.W. 2d 309, does not still represent the views of the members of this Court under the particular facts presented by the record in that case; however, the Supreme Court of the United States refused to review the validity of the injunction judgment *entered in that case* on the

ground that *the injunction had expired by its own terms* and because of the uniform policy of that Court not to review a judgment, which if reversed, the court's action would be ineffectual for want of a subject matter on which it could operate. Although the judgment was vacated, as moot, it does not appear from the opinion vacating the judgment that the Supreme Court of the United States intended thereby to overrule the common law of this State, as evidenced by the cases cited at 317 S.W. 2d 309, 314-(2, 3) of the Court's opinion, or to substitute therefor any Federal common law contrary to that Court's holding in Erie R.R. v. Tompkins, 58 S. Ct. 817. Further, each case must be decided upon its own peculiar facts and upon the particular issues of law presented for decision, hence the opinion of this Court in State v. Local No. 8-6, etc., supra, is not necessarily controlling or decisive under the facts of the case at bar, and this Court properly refused to summarily affirm the present judgment on the basis of this Court's prior judgment in another case, which had been vacated by the United States Supreme Court as moot.

In a motion filed by the appellants in this Court on May 9, 1962, appellants further state: "Independently of the basis upon which the motion to expedite the appeal was made and granted, appellants on any procedure simply do not choose to present the jeopardy question. While appellants took issue with the reasonableness of the Governor's opinion before the Circuit Court, *that court decided the question adversely to appellants.* Appellants do not wish to pursue that point on appeal. *They acquiesce in respondent's position that the requisite jeopardy existed within the meaning of the King-Thompson Act.*" (Italics ours.) In a letter filed on June 5, 1962, in lieu of a reply brief, appellants (with reference to their counsel) state that "he could not more forcefully express than he did *appellants' acquiescence in the existence of jeopardy within the meaning of the King-Thompson Act.*" (Italics ours.)

Appellants take this position regardless of the fact that this court has construed the King-Thompson Act as follows: "The King-Thompson Act is strictly emergency legislation and is not a comprehensive code for the settlement of labor disputes in utilities * * *. Emergency legislation is justified under the police powers. 16 C.J.S., Constitutional Law § 198, pp. 972-973. The purpose of seizure is the preservation of community life as encouraged and fostered by the state. The purpose of the Act is to protect its citizens against disaster." State v. Local No. 8-6, etc., supra, 317 S.W. 2d 309, 321.

Appellants in their statement of facts have substantially ignored the issue of jeopardy by the selection and statement of certain favorable evidence appearing in the record and ignoring much of the unfavorable evidence with reference to conditions existing during the two days in which the defendants, by concerted action, refused to work and operate the mass transportation system under the supervision and control of the State. In any event, what did happen during those two days is not necessarily decisive of the issues presented by plaintiff's action. Section 295.180 RSMo 1959 authorizes the Governor to act, when a lockout, strike or work stoppage occurs "* * * which, in the opinion of the governor, threatens to impair the operation of the utility so as to interfere with the public interest, health and welfare, * * * and in that case he is authorized to take immediate possession of the plant, equipment or facility for the use and operation by the state of Missouri in the public interest." The statute is not limited to what *has* happened, but includes what *may reasonably be expected to happen*. It has been suggested that the trial court might well have taken judicial notice of what could and would happen to the inhabitants of a metropolitan area consisting of some one million, one-hundred thousand persons upon the *sudden and total* discontinuance of 90 percent of the public mass transportation service of the city leaving more than 115,000 daily Missouri users of such

services without any adequate substitute for such transportation services. Courts may not assume ignorance of what everybody knows (Elder v. Delcour, 364 Mo. 835, 269 S.W. 2d 17, 19; City of St. Louis v. Pope, 344 Mo. 479, 126 S.W. 2d 1201, 1210); nevertheless, the record in this case fully supports the finding of the trial court on the issue mentioned. A court could well find from the record in this case that the further continuance of the concerted work stoppage by the defendants under the circumstances shown and the continued failure of the defendant to operate the mass transportation system of the city with the facilities and equipment of the transportation company, which had been taken over by the State and were under the supervision and control of the State, might well have resulted in extreme danger to the health, welfare and safety of the inhabitants of Kansas City, Missouri, and in unrest, general confusion, disorganization, excitement, tension, inability to reach places of work in the retail district of the city, reduction of employment and loss of wages by innocent victims of the strike, congestion of traffic, disruption of business, reduction and impairment of law-enforcement agencies and the creation of havoc, disaster and general chaos in the community. However, we need not further discuss *the issue of jeopardy to the community* within the meaning of the King-Thompson Act as construed by this Court, or the evidence upon which the trial court's finding was based, because that issue is now conceded by the appellants, as hereinbefore and hereinafter stated.

With reference to the *State's operation* of the transportation system, the defendants' evidence tended to show that the employees of the Company are not, and will not become, employees of the State of Missouri; that the employees are not paid by the State; that the State does not contribute to their social security or unemployment compensation benefits; that it does not pay their workmen's compensation claims, since these payments are made by the Company;

and that the State does not direct the employees as to what to do or where to report for work, nor does it hire, discharge or discipline them or control any aspect of the employment relationship between them and the Company or consult with the Company concerning it.

Defendants also offered evidence tending to show that the State does not and is not authorized to expend any of the Company's money; that the State does not possess the Company's bank account; that the State officers do not sign its checks or collect its revenue or make reports to the State; that no financial reports have been requested concerning the Company's receipt of its funds and the State does not make purchases of supplies for the Company nor pay its bills. Defendants also offered testimony that no property of the company was actually conveyed, transferred or otherwise turned over to the State of Missouri, except as is evidenced by the Governor's Proclamations and Orders which were served on the Company and that a State agent was designated to act under said orders. There was also evidence that the State does not participate in the management of the Company, except as stated, and that the State is not consulted by the Company's board of directors or officers as to the conduct of the Company's business. The management of the Company remains exclusively in its board of directors and there has been no change of any kind in the conduct of its business by the Company, since the Company was served with the Governors' orders and the subsequent Proclamations, including the designation of the State's agent and the orders that said agent "shall exercise the aforesaid authority as my agent forthwith, and he shall continue to exercise the aforesaid authority as my agent until and unless otherwise directed by me." The Governor's order also directed that "All rules and regulations of the aforesaid utility governing the internal management and organization of the company, and its duties and responsibilities, shall remain in force and effect throughout the term of operation by

the State of Missouri." In this connection we must say that defendants' answer admits that on the 13th day of November, 1961, said John M. Dalton, Governor of Missouri, under and by virtue of the authority vested in him by the Constitution of Missouri and statutes thereof, including Section 295.180 RSMo 1959, did take immediate possession of the plant, equipment and facilities of the said Kansas City Transit, Inc., "except that defendants aver that the taking of possession was to insure continuance of operations in the State of Kansas in addition to the State of Missouri." Defendants also offered in evidence the several Executive Orders and Proclamations of the Governor, including the one appointing Daniel C. Rogers as the Governor's agent, as hereinbefore stated, and containing the related orders with reference thereto.

Assuming that the trial judge accepted and believed the testimony of the defendants' witnesses with reference to the State's operation of the utility, yet the trial court may further have believed and found that there was no other possible or reasonable manner by which the State could operate the transportation system in Kansas City and protect its citizens, and particularly those citizens who were not interested in or participating in the strike of the defendants against their employer; and that the transportation system was being operated by the State, with the utility as its agent, in order to make *use* of the internal organization and well-established regulations of the utility company. See Rider v. Julian, supra, 282 S.W. 2d 484, 494.

Before reviewing the issues presented on appeal, we must consider appellants' further statement that, although they defended this cause in the Circuit Court of Jackson County upon the ground that, "(c) As applied in this case, the King-Thompson Act (*i*) operates extraterritorially, and therefore conflicts with the constitutional requirement that a state confine it authority within its own borders; and (*ii*) directly regulates interstate commerce, and therefore offends the Commerce Clause of the United States Con-

stitution independently of implementing legislation by Congress", nevertheless the appellants on this appeal *now desire to withdraw and do withdraw from the Court's consideration said ground (c)*, one of the grounds upon which the cause was submitted in the circuit court and which issue was found against the defendants. In a motion to strike certain matters filed in this Court on May 9, 1962, appellants further stated their position, as follows: "Appellants are unaware of any procedure by which a party can be required against his will to put in issue on appeal a matter he chooses not to contest."

We recognize that appellate courts customarily review cases on appeal on the basis of the issues presented by the appellants. In this case, as stated, the issues in dispute are solely between the State of Missouri and certain employees, who are on strike against the Company, and who, by concerted action, refused to operate the transportation facilities of the Company, after such facilities were in the legal possession of and under the supervision and control of the State.

As stated, the Company is not a party to this action. The pleadings and issues presented in the trial court do not present a labor dispute for decision between the Union and the Company. The trial court did not attempt to assume jurisdiction of a labor controversy or dispute, nor to decide any labor issues between employer and employees. The Governor of the State did not attempt to take possession or control of any physical property or transportation facilities *outside* of the State of Missouri. No state statute involved in this proceeding purports to require or attempt to carry on an *interstate* operation. The decree appealed from only enjoins defendants from supporting and participating in the concerted work stoppage and strike against the *State of Missouri*.

Further, the record shows that there has been no attempt, either by Executive Order, pleadings, judgment or

acts in the instant case, to extend the jurisdiction of the State of Missouri into the State of Kansas. "A state may validly regulate activities, persons, and property within its jurisdiction, although extraterritorial repercussions ensue, provided such regulation is vital to the welfare of its inhabitants, as the propriety of regulation is determined by its focus on internal problems, not by the range of its influence." 81 C.J.S., p. 861, Sec. 3; Pacific Coast Dairy v. Department of Agriculture of California, 318 U.S. 285, 295. The State did not take possession or control of the Company's property, or of any of its facilities *in any state other than the State of Missouri.* The decree conforms to the record and appellants may properly abandon any objection to the trial court's ruling on any defense submitted by them and overruled by the court, such as the defense set out in subdivision (c), supra.

Before considering appellants' brief as filed in this Court, we call attention to Supreme Court Rule 83.05, which expressly provides that "The brief for appellant shall contain: (1) * * * (the grounds on which jurisdiction is invoked); (2) A fair and concise statement of the facts without argument; (3) The points relied on, *which shall show what actions or rulings of the Court are sought to be reviewed and wherein and why they are claimed to be erroneous,* with citation of authorities thereunder * * * (e) Points Relied On. The points relied on *shall briefly and concisely state what actions or rulings of the Court are claimed to be erroneous and briefly and concisely state why it is contended the Court was wrong in any action or ruling sought to be reviewed. Setting out only abstract statements of law without showing how they are related to any action or ruling of the Court is not a compliance with this rule.*" (Italics ours.)

Appellants' statement of facts in their brief violates this rule in that it is argumentative, emphasizes the facts favorable to appellants and omits many facts unfavorable to appellants. Further, appellants not only argued the facts

in the statement of facts, but also argued issues of law. An opinion of this Court is cited and quoted from at some length in appellants' statement of facts. The brief is also subject to further criticism in that, under "Points and Authorities," appellants do not mention or refer to *the judgment appealed from,* nor do appellants briefly or concisely state what actions or rulings of the trial court are claimed to be erroneous or why any particular designated action of the trial court was wrong.

The four points relied on for reversal are stated in the brief as follows: "I. The King-Thompson Act is in conflict with and preempted by the Labor Management Relations Act, 1947 • • • II. Prohibition of a public utility strike, without substituting a compensating equivalent for it, offends substantive due process. • • • III. Prohibition of a public utility strike, without substituting a compensating equivalent for it, results in involuntary servitude. • • • IV. To forbid a person to 'incite' or 'support' a strike or refusal to work is unconstitutional for the dual and inter-locking reasons that it abridges free speech and has the vice of vagueness." Many of the subheadings under the respective main headings are abstract statements of law. Except for the fact that this case involves matters of great public importance, we should not hesitate to dismiss this appeal for the failure of appellants to comply with the rules of this Court governing the preparation and contents of appellants' briefs.

Appellants in their statement of facts say that their "brief is confined to showing that the King-Thompson Act is invalid upon the ground that (1) it is in conflict with and preempted by the Labor Management Relations Act, 1947, and that (2) it abridges federal rights conferred by the First, Thirteenth and Fourteenth Amendments of the United States Constitution"; however, under "Points Relied On" appellants have designated only the *four points* hereinbefore referred to. At no place in appellants' brief

do they claim they had the right to strike against the State and in their answer denied that they did so, yet *essentially that is what the judgment appealed from expressly enjoined.* Further, under "Points Relied On" there is no assignment that the trial court erred in entering the particular judgment and decree that the court did enter in this case.

After the petition for an injunction was filed, the appellants filed a motion to dismiss the petition and then offered evidence in support of it. See Supreme Court Rules 55.29, 55.31, 55.33. The motion to dismiss was in effect overruled, the temporary injunction was continued in effect, defendants' answer was then filed, evidence was heard and the judgment appealed from was entered. No motion for a new trial was filed, heard or ruled because not required by Supreme Court Rule 79.03. The appeal was, therefore, taken from the judgment on the merits and there is no assignment under Points and Authorities that the court erred in overruling appellants' motion to dismiss the petition, an assignment that would have presented an issue of law.

As stated, the first point relied on by appellants is that "The King-Thompson Act is in conflict with and preempted by the Labor Management Relations Act, 1947." This assignment is *not* directed to what the trial court decided, but seeks an *advisory opinion* as to the validity of all of the provisions of a state act, including many matters not in issue in any manner in this case, nor decided by the trial court. Allison v. Retirement Board of Police Retirement System of Kansas City, Mo. Sup., 343 S.W. 2d 25, 35; State of Missouri ex rel. Jenkins v. Bradley, Mo. Sup., 358 S.W. 2d 38, 39. Judicial review will not be accorded questions which are not directly and necessarily involved in the particular legal situation presented on appeal. Juengel v. City of Glendale, Mo. Sup., 161 S.W. 2d 408, 409(2); Kansas City, Mo., v. Williams, 8 Cir. 205 F. 2d 47,

51(3), certiorari denied 346 U.S. 826. Further, Supreme Court Rule 83.13(a) governing appeals expressly provides that "no allegations of error shall be considered in any civil appeal except such as have been presented to or expressly decided by the trial court." It will be noted that Point I is an attack upon the King-Thompson Act in its entirety. In effect, the point may be referred to as a "shot-gun approach" intended to abolish the Act "lock, stock and barrel," regardless of what issues were presented to and ruled by the trial court.

In making this assignment the appellants, of course, ignore the holding of this Court in State ex rel. State Board of Mediation v. Pigg, supra, 244 S.W. 2d 75, in which this Court held that certain provisions of the Act were *severable*, particularly those sections directly affecting the State Board of Mediation, its legal existence, powers and duties. 244 S.W. 2d 75, 79(7). The first eight sections of the King-Thompson Act, Secs. 295.010-295.080 RSMo 1959, V.A.M.S., declaring state policy, defining terms, creating the Board and defining its duties, powers and mediation services, were also held *not* to be in conflict with the Labor Management Relations Act, 1947, particularly in view of Secs. 202(c) and 203(b), 29 U.S.C.A. Secs. 172(c) and 173(b), which contemplate the existence of state boards and cooperation with them. 244 S.W. 2d 80(8, 9). This ruling in the Pigg case was approved by this Court in State v. Local No. 8-6, etc., supra, 317 S.W. 2d 309, 315(4), where it was *further* held that the sections considered and ruled in State v. Local No. 8-6, etc., supra, were also *severable* from and could stand independently of the remainder of the Act, since the remaining sections of the Act were not before the Court for consideration in that case. 317 S.W. 2d 309, 323.

Further, the point relied on does *not* in any subhead thereunder direct attention to any particular section of the King-Thompson Act, although under subhead (f) Sections

295.010, 295.090, 295.100, 295.120, 295.150, 295.160 and 295.200.5 are cited, but these sections are not the sections presented to and ruled on by the trial judge. Appellants' first subpoint under Point I is that "The operations of the Company affect interstate commerce so as to bring its labor relations within the governance of the Labor Management Relations Act, 1947, and to subject it, its employees and the Union to the jurisdiction of the National Labor Relations Board." This abstract statement of law is not questioned by respondent at any place in the record and it is fully conceded by the Governor's Proclamation. Further, the appellants on this appeal have expressly waived any claim for reversal on the ground that the King-Thompson Act "directly regulates interstate commerce, and therefore offends the Commerce Clause of the United States Constitution."

In further support of appellants' first point it is contended that "The protective applicability of the national Act to strikes conducted by public utility employees cannot be displaced because of the public character of a utility and its historic amenability to control, the importance of uninterrupted utility services to the community, or the duty to render continuous service." No such issue was ruled by the judgment entered. It is further contended that the heart of the National Act is the right to engage in free and private collective bargaining backed by the right to strike; and that in prohibiting any "concerted refusal to work" for the state after any plant, equipment or facility has been taken over by the state, the King-Thompson Act is in irreconcilable conflict with the National Act because the King-Thompson Act "forbids peaceful strikes to enforce union demands for wages, hours and working conditions." No section of the King-Thompson Act prohibiting free and private collective bargaining or peaceful strikes to enforce union demands is cited in support of the last quoted statement; however, the Act does make *unlawful the concerted refusal to work for the State*

in the operation of the utility after any such plant, equipment or facility has been taken over by the State in an effort to protect the public by use of the police power of the State. Appellants expressly admit that the right to strike enjoys constitutional protection only "against unreasonable legislative prohibition or curtailment."

In consideration of the above arguments it must be kept in mind that employees of a public service corporation upon entering such service assume an implied obligation to perform their duties in such a manner as will enable the corporation to discharge its obligations to the public. 35 Am. Jur., Master and Servant, p. 514, Sec. 82. See also Wilson v. New, 243 U.S. 332, 353. The Public Service Commission law recognizes this and imposes penalties on employees as well as on utilities for their wrongful acts. Sec. 386.580 RSMo 1959. Further, employees in accepting employment by a public utility, *such as a utility operating mass transportation services in a great city,* must to some extent surrender certain rights and their employment is subject to the police power of the State in emergencies and when the operating properties are taken over by the State.

In the case of United Public Workers of America, v. Mitchell, 330 U.S. 75, 67 S. Ct. 556, 567, in construing and upholding the Hatch Act, 18 U.S.C.A. §§ 61h and 61o, which declared unlawful certain specified political activities of Federal employees, the United States Supreme Court pointed out that fundamental human rights were not absolutes and that the "court must balance the extent of the guarantees of freedom against a congressional enactment to protect a democratic society against the supposed evil of political partisanship by classified employees of government." A restriction against taking "any active part in political management or in political campaigns" was approved. Also, the acceptance of numerous other types of employment necessarily requires the surrender of what would otherwise constitute the invasion of personal rights as, for example, in the case of Fraternal Order of

Police v. Harris, 306 Mich. 68, 10 N.W. 2d 310, 312, where the court said: "Those who serve the public, either as the makers of the law, the interpreters of the law, or those who enforce the law, must necessarily surrender, while acting in such capacity, some of their presumed private rights." Restrictions upon the political activities of civil service employees of the City of St. Louis was upheld although attacked on constitutional grounds of interference with freedom of speech and the deprivation of property and liberty without due process of law. State ex inf. McKittrick, ex rel. Ham v. Kirby, 349 Mo. 988, 163 S.W. 2d 990; and see King v. Priest, 357 Mo. 68, 206 S.W. 2d 547, 556, appeal dismissed, 68 S. Ct. 736, rehearing denied 68 S. Ct. 901, where it was held that certain rules and regulations adopted by the Police Department of the City of St. Louis were not unconstitutional in denying appellants and other members of the police department the right of freedom of speech and freedom of assembly and petition contrary to the First Amendment and Sec. 1 of the Fourteenth Amendment to the Constitution of the United States. Further, *in accepting employment with a company operating a mass transportation system in a great city of this State* the employees must be assumed to have done so in view of the State law governing the operation of such companies and providing for State operation in temporary emergencies to protect the public from disaster, and such law necessarily became a part of their contract of employment. See Metropolitan Life Ins. Co. v. Siebert, 72 F. 2d 6; Gray v. Metropolitan Life Ins. Co., Mo. App., 150 S.W. 2d 563, 564(4).

Appellants further argue that while a public utility strike may cause a local "emergency," judged by local standards, such an "emergency" does not justify state prohibition or *curtailment of a strike by the employees of a utility against their employer.* Again, appellants refuse to consider the issue decided by the court as evidenced by the judgment entered. The argument overlooks the fact

that the decree enjoined only the concerted refusal to work for and under the supervision of the State in the operation of the mass transportation system. The Act does not prohibit or curtail strikes by employees, absent an emergency jeopardizing the health, welfare and safety of the public sufficient to authorize and sustain the action of the Governor in taking possession and control of the physical properties, plant and transportation facilities of the employer-company against which the strike is directed. Even then judicial action is required to obtain enforcement. Further, the argument ignores appellants' admission of the existence of *jeopardy* under the provisions of the Act, *as construed by this Court.* The facts and and admissions therefore bring this case *within the exceptions*, as stated, in that the issue is *not the regulation of any protected activity of a labor union* and no unfair labor practice is charged or shown. No issue, such as to picketing, peaceful or otherwise, is involved, nor was any such issue decided by the trial court. The issue is as to the right of the State *to protect the public in an emergency situation from disaster* resulting from disputes between employers and employees after state seizure of the physical properties.

A strike or lockout which jeopardizes the public health, safety and welfare is not a protected activity under the National Labor Management Relations Act, 1947. This Court in the case of State v. Local No. 8-6, etc., supra, 317 S.W. 2d 309, 319(11) pointed out that the congressional declaration in Section 1(b) of the Act, 29 U.S.C.A., Sec. 141(b) clearly indicated a purpose to subordinate industrial strife to the public health, safety and welfare; and that consistent with the subordination of labor acts and practices which jeopardize the public interest, it is clear that Congress did not intend to remove any existing "limitations or qualifications" on the right to strike. The United States Supreme Court has in numerous cases, as set out in this Court's opinion (317 S.W. 2d 309, 319[11]), recognized that the violation of *local laws* enacted for the

preservation of property rights and personal safety are not protected by the Federal Act. It is there further pointed out that such holdings are consistent with the congressional intent as expressed in other acts where the exercise of the police power in local government is particularly suitable.

This Court also pointed out in State v. Local No. 8-6, etc., supra, 317 S.W. 2d 309, 321(13), that a growing number of decisions of the United States Supreme Court indicate a considerable area where state activity and regulation is permitted. The cases which support that conclusion are reviewed and considered in the mentioned opinion, 317 S.W. 2d 309, 321(13). The judgment in question here does not purport to deal with rights between the employer and the employees. It was entered after the State's seizure of the physical properties of the utility and it only enjoined the appellants "from continuing, inciting, supporting and participating in the work stoppage, refusal to work and strike *against the State of Missouri.*" (Italics ours.) Further, we cannot and do not construe the King-Thompson Act as making any provision for the *permanent operation* of a utility by the State after any such seizure. The Act as construed by the officials of this State in administering it show that the Governor may release the control of a utility's physical property at any time after seizure. (See Appendix A and Appendix B set out at the close of this opinion.) We find nothing in the Act to prevent appellants from making application to the Governor at any time for the release of the property of the utility upon reasonable notice and terms and any such release would relieve appellants from the particular judgment entered in this case. Further, as hereinafter mentioned, in the event of the denial of such relief appellants could apply to the trial court for a modification of the judgment theretofore entered.

While Section 295.180 RSMo 1959 provides that "whenever such public utility, its plant, equipment or facility has

been or is hereafter so taken by reason of a strike, lockout, threatened strike, threatened lockout, work stoppage or slowdown, or other cause, such utility, plant, equipment or facility shall be returned to the owners thereof *as soon as practicable after the settlement of said labor dispute*, and it shall thereupon be the duty of such utility to continue the operation of the plant facility, or equipment in accordance with its franchise and certificate of public convenience and necessity" (italics ours), nevertheless there is no provision in the Act requiring state operation and control, until a settlement of the labor dispute has been reached, and we find no authority requiring us to so hold. Absent substantial evidence of the existence of an emergency threatening the public health, safety and welfare with impending disaster (as hereinbefore stated and previously held), state operation and control of the assets of a utility and a permanent injunction against concerted refusal to operate the utility's property cannot be sustained. Seizure and injunctive relief are provided only in emergency situations. We must and do construe the term "emergency" to imply a temporary situation and necessarily dependent upon the particular facts of the particular case under consideration. Nor can we construe the Act as authorizing a *permanent injunction* prohibiting defendants from striking against either the Company or the State and, therefore, the court should have retained jurisdiction of the cause, so that the equitable relief granted might be modified in accordance with changing conditions.

As stated, the right of the Union to engage in a peaceful strike against the utility is not denied by the Act, except by the limitations which are imposed during emergency situations and only after state seizure; however, the decree appealed from does not deny the right of appellants to strike against the Company, and that issue was not decided by the court. In the case of State v. Local No. 8-6, etc., supra, 317 S.W. 2d 309, 321, this Court, as stated, said: "The King-Thompson Act is strictly emergency legisla-

tion and is not a comprehensive code for the settlement of labor disputes in utilities as the Wisconsin Act appeared to be. Emergency legislation is justified under the police powers. * * * The purpose of seizure is the preservation of community life as encouraged and fostered by the state. The purpose of the Act is to protect its citizens against disaster. As previously indicated, we deem the strike in the circumstances in this case to be unlawful * * *." Clearly the Legislature did not intend that disaster conditions to the public and the creation of emergency situations endangering the health, safety and welfare of the general public should be used for the purpose of obtaining the settlement of even peaceful strikes.

There is no contention here by the State, nor has this Court held that the total stoppage of the mass transportation system in Kansas City, after reasonable notice and an opportunity to the public to adjust to such a situation, would create a *permanent emergency situation* entitling the State to a permanent injunction against a concerted stoppage of work, or authorizing the State to indefinitely operate the transportation system on the theory of protecting the citizens *from disaster in an emergency situation.* Nor does this Court expect to so hold. However, in this case, jeopardy to the public, within the meaning of the provisions of the Act and as construed by this Court, is now admitted by appellants to have existed at the time of the seizure and the entering of the judgment appealed from.

If the emergency situation no longer in fact exists, appellants may apply to the court for a modification of the decree on terms, since it is not this Court's purpose or intention to hold that the mere total discontinuance of mass transportation services in Kansas City, Missouri, after reasonable notice to the public will necessarily create such an emergency or evidence such an impending disaster to public health, safety and welfare as to justify permanent injunctive relief under the King-Thompson Act.

In their printed argument the appellants undertake to support their attack upon the entire King-Thompson Act, as being in conflict with and pre-empted by the Labor Management Relations Act, by citing Section 295.200 RSMo 1959 and by stating that it "prohibits a strike as a means of enforcing demands", however, defendants do not claim *the right to strike against the State* and in their answer to plaintiff's petition *they expressly denied that they did strike against the State*, although the fact that, by concerted action, they refused to operate the mass transportation system under the State's supervision and control, until the injunction decree was entered, is not disputed.

Appellants make numerous arguments and contentions with reference to the invalidity of the King-Thompson Act considered as a whole, as stated, under Point I of their "Points Relied On." However, the Act, considered as a whole, is not before the Court for consideration, nor was it before the trial court, nor was its validity as a whole considered or ruled. Appellants are limited to a consideration of the judgment entered, which specific judgment they have elected to ignore in their brief. It will be unnecessary to review in detail the subpoints set out in appellants' brief, since appellants' attack on all sections of the King-Thompson Act is primarily based upon the decision of the Supreme Court in the case of Amalgamated Ass'n of St., Elec. Ry. & Mtr. Coach Employees of America, Div. 998, et al., v. Wisconsin Employment Relations Board, 340 U.S. 383.

Before considering that case in some detail perhaps we should say that experienced lawyers and competent judges have long since ceased to accept, as legal authority, mere casual statements in the opinion of any court, particularly where such statements are unrelated to the facts and issues presented for decision. Mere obiter, or a speech by the writer of an opinion, must not be confused with the *deci-*

sion of the court based upon the facts shown by the record and by the legal issues presented to and decided by the court.

A mere casual examination of the Wisconsin Act, which was considered in the Amal. Ass'n case (Wisc. Statute 1949, Sec. 111.50 to 111.63), shows that the similarities between the Wisconsin Act and the King-Thompson Act, Chapter 295 RSMo 1959, are very superficial, while *the differences are fundamental.* These differences clearly appear from even a casual examination of the opinion of Chief Justice Vinson in the Amal. Ass'n case, from which opinion we shall quote at some length. These fundamental differences are shown, as follows, in the Amal. Ass'n opinion. The court said. "Whenever such an 'impasse' occurs, the Wisconsin Employment Relations Board is empowered to appoint a conciliator to meet with the parties in an effort to settle the dispute. • • • In the event of a failure of conciliation, the Board is directed to select arbitrators *who shall 'hear and determine' the dispute.* • • • In summary, the act *substitutes arbitration upon order of the Board for collective bargaining* whenever an impasse is reached in the bargaining process. And, to insure conformity with the statutory scheme, Wisconsin *denies to utility employees the right to strike.* (340 U.S. 383, l. c. 388) • • • However, the Wisconsin Act before us *is not 'emergency' legislation but a comprehensive code for the settlement of labor disputes between public-utility employers and employees.* Far from being limited to 'local emergencies,' the act has been applied to disputes national in scope, and application of the act does not require the existence of an 'emergency.' (l.c. 393-394) • • • And, where, as here, the state seeks to deny entirely a federally guaranteed right which Congress itself restricted only to a limited extent in case of national emergencies, however serious, it is manifest that the state legislation is in conflict with federal law. (l.c. 394) • • • Michigan, in O'Brien, sought to impose conditions on the right to strike

and now Wisconsin seeks to abrogate that right altogether insofar as petitioners are concerned. (l.c. 395-396) • • • Congress knew full well that its labor legislation 'preempts the field that the act covers insofar as commerce within the meaning of the act is concerned' and demonstrated its ability to spell out with particularity those areas in which it desired state regulation to be operative. This court, in the exercise of its judicial function, must take the comprehensive and valid federal legislation as enacted and declare invalid state regulation which impinges on that legislation. *Fifth.* It would be sufficient to state that the Wisconsin Act, *in forbidding peaceful strikes for higher wages* in industries covered by the Federal Act, *has forbidden the exercise of rights protected by § 7 of the Federal Act.*" (l.c. 397-398) (Italics and local citations ours.)

After pointing out further specific conflicts between the Wisconsin Act and the policies of the National Act the opinion concludes: "Having found that the Wisconsin Public Utility Anti-Strike Law conflicts with that federal legislation, the judgments enforcing the Wisconsin Act cannot stand." (l.c. 399.)

The King-Thompson Act is so *fundamentally different* from the Wisconsin Act that the mentioned case does not apply and further the judgment appealed from in this case is so totally different from the Wisconsin judgment, which was reversed, that the Wisconsin case could not apply and is not controlling.

The King-Thompson Act makes no provision for arbitrators who shall hear and finally *determine* labor *disputes,* nor does the King-Thompson Act deny to utility employees the right to strike. No issue as to compulsory arbitration is presented on this record. The Act does provide for the safety of the public in the event of a strike and the Governor's finding of emergency and for judicial proceeding after the State has taken possession of the utility's

property. There is no provision in the King-Thompson Act purporting to provide for concurrent *state regulation* of peaceful strikes for higher wages. In any event that is not the issue in this case. Further, the King-Thompson Act has been held by the highest court in Missouri to be emergency legislation; and that "The purpose of seizure is the preservation of community life as encouraged and fostered by the State. The purpose of the Act is to protect its citizens against disaster." 317 S.W. 2d 309, 321. Appellants have failed to point out wherein by the King-Thompson Act "the State seeks to deny *entirely* a federally guaranteed right," (italics ours) or wherein the Act has been applied to "disputes national in scope." No section of the King-Thompson Act seeks to abrogate the right of employees to strike against their employers, prior to the state's seizure of the utility, and the judgment here does not mention the employer. The employer-employee relationship is not the subject matter of the action. Further, we find no provision of the National Labor Relations Act *authorizing* a strike against the state, and the Federal legislation in question does not pre-empt the right of the State to obtain the decree in question here.

Further, it is well settled that the exercise of the police power of a state is superseded only where the repugnance or conflict with a Federal act is so direct and positive that the two acts cannot be reconciled. United Const. Workers, Affiliated with United Mine Workers of American v. Laburnum Construction Corp., 347 U.S. 656; Breard v. City of Alexandria, 341 U.S. 622. As stated by Mr. Chief Justice Hughes in Kelly v. State of Washington, 302 U.S. 1, 10: "The principle is thoroughly established that the exercise by the state of its police power, which would be valid if not superseded by federal action, is superseded only where the repugnance or conflict is so 'direct and positive' that the two acts cannot 'be reconciled or consistently stand together.'" And see State v. Local 8-6, etc., supra, 317 S.W. 2d 309, 321.

It would unduly extend this opinion to review and distinguish the many cases relied upon by appellants to obtain the reversal of the present judgment. Perhaps a few other cases than the Wisconsin case should be referred to. Appellants cite the case of Youngstown Sheet & Tube Company v. Sawyer, 343 U.S. 579, and say that "Seizure is the particular technique employed by the King-Thompson Act to signal the prohibition of a utility strike"; that "the Supreme Court settled the question * * * when it held that the President had no constitutional power to seize the steel mills to avert a national emergency, and premised this conclusion in significant part on the fact that Congress in the Taft-Hartley Act had withheld seizure authority from the President even in national emergency strikes"; and that "the power to seize which Congress withheld from the President to avert a national emergency it did not grant to a State Governor to avert a local emergency." In making the above arguments, the appellants overlook the fact that the Governor of Missouri acted upon legislative authority granted by the State Legislature under the police power of the State; and that the decree appealed from by appellants was entered after notice and a hearing in a judicial proceeding.

Appellants also cite Weber, et al., v. Anheuser-Busch, Inc., 348 U.S. 468, 480, where, in a dispute between two unions over work being performed for their employer, each claiming the work for its own members, one union went on a strike and the employer filed with the National Labor Relations Board a charge of an unfair labor practice under Section 8(b)(4)(D) of the Taft-Hartley Act against the striking union, but the Board held that no "dispute" existed within the meaning of that subsection and quashed the notice of a hearing. The employer then filed a complaint in a Missouri state court alleging violation of other subsections of the Taft-Hartley Act and also a violation of the State's restraint of trade statute. The state court enjoined the strike as a restraint of trade, but the United

States Supreme Court held that the state court was without jurisdiction to enjoin the conduct of the union since its jurisdiction had been pre-empted by authority vested in the National Labor Relations Board with reference to unfair labor practices. It will be noted that that case was instituted in the state court by the employer for an injunction to restrain picketing of the plant by defendants (employees) on the ground that it was in furtherance of an unlawful conspiracy and in restraint of trade. In other words, the action was between the employer and the employee, while in the case now before this Court the employer, Kansas City Transit, Inc., is not even a party to the record, which is wholly between the State of Missouri and the defendants-appellants, and no unfair labor practices are involved. Other cases cited by appellants are also easily distinguishable from the present proceeding.

Appellants also argue that the failure of the Senate of the 86th Congress to approve the Holland Amendment and the previous rejection by Congress of certain other proposals must be construed as supporting appellants' construction of certain cases *previously* decided by the Supreme Court. We do not consider the cases relied upon to be controlling in this case, nor do we consider the rejection of the various mentioned proposals to be of any significance. We find no merit in appellants' Point I of their brief insofar as it applies to any issue presented to and decided by the trial court in this proceeding.

Under Point II appellants say that "prohibition of a public utility strike, *without substituting a compensating equivalent for it*, offends substantive due process." The assignment is an abstract statement of law, not directed to the judgment appealed from and it does not comply with the rules of this Court as a proper assignment. No constitutional provision is cited by number. The right to strike is not in question in this case as "the right to strike" is generally understood, to wit, against a private employer.

Appellants further argue that "To prohibit public utility employees from striking cripples their ability through collective bargaining to induce their employer to grant satisfactory terms and effectively compels them to work under terms unilaterally dictated by the employer." Again, that issue is not before the court for consideration, since the appeal is from *a particular judgment which does not concern the right of public utility employees to strike against their employer* and there is nothing in the King-Thompson Act to prevent peaceful strikes where public safety is not endangered. *The King-Thompson Act deals with the protection of the public, after such a strike has been called or has been put into effect and after public safety, health and welfare is sufficiently endangered to require the State to be concerned with the operation of the utility and has been taken possession of its physical property and seeks to operate the utility under its supervision to prevent public disaster.*

It is further argued that "A statute is arbitrary and capricious * * * when it sacrifices the employees' interest in a fair wage and working conditions by depriving them, without any compensating equivalent, of the right to strike, their only effective weapon in the competition over the division of the joint product of capital and labor." Again, *that is not the issue presented by the appeal from the judgment* and, for that matter, the particular assignment that "Prohibition of a public utility strike, *without substituting a compensating equivalent for it;* offends substantive due process" (italics ours) was not an issue presented to or decided by the trial court and hence it is not for review here, nor does any provision of the King-Thompson Act, as stated, contain any provision prohibiting public utility employees from striking against their private employer, except that under the present judgment they are enjoined from striking *against the State during state operation of the utility.*

As stated, the third assignment under Points and Authorities in appellants' brief is that "Prohibition of a public utility strike, *without substituting a compensating equivalent for it*, results in involuntary servitude." Appellants argue that the provision of the King-Thompson Act prohibiting concerted refusal to work for or *to strike against the State*, after the State, in an emergency to protect its people under the police power, has taken possession of a strike-bound utility, imposes involuntary servitude. This argument ignores and fails to give consideration to Section 295.210 RSMo 1959, the closing provision of the King-Thompson Act. We find nothing in the record presented on appeal to show that either Point II or III in the form presented here was directly presented to or passed upon by the trial court, or that either point was impliedly ruled by the judgment entered. However, we approve the reasoning and ruling of this Court on somewhat similar issues in State v. Local No. 8-6, etc., supra, 317 S.W. 2d 309, 325(22).

Appellants' fourth point, as stated, is that "To forbid a person to 'incite' or 'support' a strike or refusal to work is unconstitutional for the dual and interlocking reasons that it abridges free speech and has the vice of vagueness." This contention, like the two previous ones, is not directed to the *particular decision* as made by the court under the particular facts of this case, and again appellants seek an advisory opinion upon hypothetical issues which were not ruled and decided. Clearly there is nothing in the decree as entered that interferes in any way with employees' expressions of distaste for the employer's practices insofar as they relate to their relationship to the private employer, the utility or transportation company. Appellants' argument assumes that the decree is directed to a strike against the Company rather than a concerted refusal to operate the mass transportation system under state control.

Further, with reference to the issues attempted to be raised by appellants' Points II, III and IV, perhaps we

should say that, while in the closing portion of what appellants call a "Statement of Facts", the appellants say that their "brief is confined to showing that the King-Thompson Act is invalid upon the ground (1) that it is in conflict with and preempted by the Labor Management Relations Act, 1947, and (2) that it abridges federal rights conferred by the First, Thirteenth and Fourteenth Amendments of the United States Constitution," yet these latter issues are not properly presented for decision under Points and Authorities. As stated, the last three assignments do not comply with the rules of this Court governing appellate briefs. All of the assignments are, however, in effect, more or less directed to alleged *violations by the decree* of appellants' alleged rights under the First, Thirteenth and Fourteenth Amendments to the Constitution of the United States. It is sufficient to say that, substantially, the same issues were raised and arguments made with reference to this same King-Thompson Act in the case of State v. Local No. 8-6, etc., supra; and that said issues were therein ruled adversely to appellants' contentions, as may be noted by reference to the report of that case in 317 S.W. 2d 309, 324(19), 325(22), and this Court again approves the rulings in said opinion with reference to said issues, although said issues are not properly raised and presented for decision in this case and are not before this Court for decision at this time.

As hereinbefore indicated, the judgment entered is modified so that the trial court retains jurisdiction of the cause, so that it may modify its decree in accordance with changing facts and conditions as hereinbefore indicated. As modified the judgment is affirmed and the cause is remanded.

S. P. DALTON, *Judge.*

APPENDIX A

THE FOLLOWING INFORMATION ON 9 SEIZURES UNDER THE KING-THOMPSON ACT WAS COMPILED FROM THE RECORDS OF THE MISSOURI STATE BOARD OF MEDIATION, JEFFERSON CITY, MISSOURI

Year	Case No.	Style of Case	Contract Expired	Strike Started	Seizure Started	Seizure Ended
1950	157	Kansas City Public Service Company, Div. 1287, Amal. Assn. of St. Elec. Rlwy. and Mtr. Coach Emp. of America	12/31/49	4/29/50	4/29/50	12/11/50
1950	164	St. Louis Public Service Company, Local 788, Amal. Assn. of St. Elec. Rlwy. and Mtr. Coach Emp. of America	12/31/49	8/10/50	8/10/50	10/19/50
1955	560	St. Louis Public Service Co., Div. 788, Amal. Assn. of St., Elec. Rlwy. and Mtr. Coach Emp. of America	2/28/55	10/10/55	10/11/55	11/23/55
1956	645	Laclede Gas Company Local 8-194, Oil, Chemical and Atomic Workers Int'l. Union	6/30/56	7/ 1/56	7/ 5/56	10/31/56
	646	Laclede Gas Company Local 8-6, Oil, Chemical and Atomic Workers Int'l. Union				
	647	Laclede Gas Company, Local 8-109, Oil, Chemical and Atomic Workers Int'l. Union				
1956	650	Kansas City Power & Light Company, Local 412, IBEW	6/30/56	7/ 5/56	7/ 6/56	7/17/56
	651	Kansas City Power & Light Company, Local 1464, IBEW				
	652	Kansas City Power & Light Company, Local 1613, IBEW				
1957	708	Kansas City Power and Light Company, Local 1464, IBEW	6/30/57	8/26/57	8/31/57	6/25/58
	709	Kansas City Power and Light Company, Local 412, IBEW				
	710	Kansas City Power and Light Company, Local 1613, IBEW				
1957	737	Kansas City Public Service Company, Div. 1287, Amal. Assn. of St., Elec., Rlwy., and Mtr. Coach Emp. of America	10/31/57	11/ 6/57	11/ 6/57	3/ 6/58
1960	889	Kansas City Power and Light Company, Local 1464, IBEW	6/30/60	7/12/60	8/ 5/60	5/31/61
1961	957	Kansas City Transit (formerly Public Service Company) Div. 1287, Amal. Assn.	10/31/61	11/13/61	11/13/61	still under seizure

Respectfully submitted,

MISSOURI STATE BOARD OF MEDIATION

/s/ DANIEL C. ROGERS May 16, 1962

Daniel C. Rogers

Chairman

APPENDIX B

NON-SEIZURE CASES UNDER THE KING-THOMPSON ACT

No.	Year	Case No.	Style of Case	Strike Started	Strike Ended
(1)	1948	24	Associated Highway Carriers In. Local No. 41—Int'l. Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Kansas City)	3/8/48	3/14/48
(2)	1952	267	Southwestern Bell Telephone Co. Communications Workers of America Division 20	3/6/52	3/10/52
(3)	1952	280	Capital City Telephone Company Local No. 2, IBEW	3/23/52	4/2/52
(4)	1952	367	Motor Carriers Council of St. Louis, Local 600, District 9. Teamsters, Chauffeurs', Warehousemen & Helpers of America (St. Louis)	6/30/52	8/2/52
(5)	1952	293	Grundy Electric Coop., Inc., Local No. 53, IBEW	8/29/52	8/31/52
(6)	1953	418	Capital City Telephone Company, Jefferson City Local No. 2, IBEW	2/27/53	4/2/53
(7)	1953	(Wild cat)	Laclede Gas Company, Local 8-109, Oil, Chemical & Atomic Workers International Union	3/23/53	3/24/53
(8)	1953	432	St. Louis Public Service Company Div. 788—Amal. Assn. of St, Louis Rlwy. and Mtr. Coach Employees	7/1/53	7/2/53
(9)	1953	451	Southwestern Bell Telephone Co., Communications Workers of America	8/20/53	8/21/53
(10)	1953	359	Kansas City Power & Light Company Local 1464. IBEW	9/18/53	9/22/53
(11)	1954	503	Transcontinental Bus System, Inc., Continental Central Lines Brotherhood of Railroad Trainmen	7/5/54	10/7/54
(12)	1954	511	Kansas City Power & Light Company Local 1613, IBEW (Clerical Employees)	7/22/54	7/22/54
(13)	1955	563	Missouri Water Company District 50, UMWA	3/23/55	3/25/55
(14)	1955	516	Laclede Gas Company Local 8-6, Oil, Chemical & Atomic Workers	5/13/55	5/15/55
(15)	1957	744	Pemiscot-Dunklin Electric Coopérative Hyatt Local 702. IBEW	12/21/57	12/21/57
(16)	1958	778	Union Electric Company, Local 1439, IBEW	8/11/58	8/12/58
(17)	1960	885	Laclede Gas Company Local 8 194, Oil, Chemical & Atomic Workers International Union	6/30/60	7/2/60
(18)	1960	886	Laclede Gas Company Local 8-6, Oil, Chemical and Atomic Workers International Union.	6/30/60	7/2/60
(19)	1961	926	Gas Service Company Local 781, Gas Workers Metal Trade Union	6/7/61	6/29/61
(20)	1961	958	Gas Service Company District 50, UMWA Region 55	11/1/61	11/10/61
(21)	1962	960	Crawford Electric Cooperative Inc., Local No. 2. IBEW Bourbon	2/5/62	2/12/62

The Governor did not make a finding in any of the foregoing twenty-one strikes that the public interest, health and welfare was jeopardized. There was, therefore, no seizure in any of the cases:

Respectfully submitted,

MISSOURI STATE BOARD OF MEDIATION

/s/ DANIEL C. ROGERS May 18, 1962

Daniel C. Rogers
Chairman

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

Filed June 22, 1962

Civil Action No. 784

DIVISION 1287, AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, AFL-CIO, *Plaintiff*,

v.

JOHN M. DALTON, GOVERNOR OF THE STATE OF MISSOURI,

STATE OF MISSOURI BOARD OF MEDIATION,

DANIEL C. ROGERS, INDIVIDUALLY AND AS CHAIRMAN OF THE STATE OF MISSOURI BOARD OF MEDIATION,

CHARLES BIBBS, INDIVIDUALLY AND AS MEMBER OF THE STATE OF MISSOURI BOARD OF MEDIATION,

ALBERT FULTS, INDIVIDUALLY AND AS MEMBER OF THE STATE OF MISSOURI BOARD OF MEDIATION,

J. RAYMOND LAMBRIGHT, INDIVIDUALLY AND AS MEMBER OF THE STATE OF MISSOURI BOARD OF MEDIATION, and

TRUMAN HENRY, INDIVIDUALLY AND AS MEMBER OF THE STATE OF MISSOURI BOARD OF MEDIATION, *Defendants*.

Before RIDGE, *Circuit Judge*, and
DUNCAN and BECKER, *District Judges*

Memorandum—Opinion

BECKER, *District Judge:*

This is a suit brought by a mass transit employees' union for a restraining order, injunction and declaratory judgment against officials of the State of Missouri, involving the validity of Missouri's Public Utility Seizure

and Anti-Strike Law. This law, known as the King-Thompson Act, authorizes the Governor of Missouri to seize and operate a public utility affected by a work stoppage when, in his opinion, the public interest, health, and welfare are jeopardized.

Pending Legal Actions in Federal and State Courts

On November 14, 1961, the plaintiff Union filed this suit for declaratory judgment, restraining order, and for temporary and permanent injunctions, attacking the validity of the King-Thompson Act,[1] on the charge of conflict with the National Labor Relations Act[2] and on many separate charges of unconstitutionality.

On November 15, 1961, the State of Missouri filed in the Circuit Court of Jackson County a petition for a restraining order and injunction to enforce the no-strike provisions of the King-Thompson Act, securing an immediate temporary restraining order against continuance of the strike.

On November 27, the writer, acting as Judge of the United States District Court, denied the Union's motion

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[1] The entire Act, Chapter 295, Revised Statutes of Missouri, 1959, §§ 295.010-295.210, inclusive. See *Amalgamated Association* v. *Wisconsin Employment Relations Board*, 340 U.S. 383, 71 S. Ct. 359, 95 L. ed. 364, 22 A.L.R. 2d 894, invalidating a Wisconsin Public Utility Anti-Strike Law which differs from the Missouri King-Thompson Act in that the Wisconsin Act (1) provided for compulsory arbitration, (2) did not provide for seizure and (3) was not limited to emergencies jeopardizing the public interest, health and welfare. Compare *State* v. *Local No. 8-6* (Mo. Sup. 1958) 317 S.W. 2d 309, *en banc*, judgment vacated as moot, *Local 8-6* v. *Missouri*, 361 U.S. 363, 80 S. Ct. 391, 4 L. ed. 2d 373. There are other distinctions and perhaps real differences in the two acts. Shute, *A Survey of Missouri Labor Law*, Part VII, 18 Mo. L. Rev. 93, l.c. 154-192 (153).

[2] 61 Stat. 316, Title 29, U.S.C. §§ 141-187, allegedly in violation of Section 8 of Article I and Article VI of the Constitution of the United States. This is the claim of "preemption."

for a temporary restraining order against the seizure and enforcement through state court suit of the King-Thompson Act. However, the Union's request to convene a Three-Judge Court to hear the Union's complaint was sustained.[3] This Three-Judge Court was duly convened.

Judgment and Appeal in the State Court

The Circuit Court of Jackson County, on November 27 and 28, 1961, heard the state court suit on the merits. After evidence was heard, the temporary restraining order was continued in force. Finally, on February 12, 1962, a permanent injunction was granted in a judgment upholding the seizure and enjoining the strike.

An appeal from this judgment to the Missouri Supreme Court was taken by the Union. This appeal was submitted on briefs without oral argument to expedite its determination. There is every evidence that the Missouri courts are adjudicating the state court suit with unusual speed.

Issues in the State Court Suit

The Union concedes that it defended the state court suit for enforcement of the seizure and anti-strike provisions upon all grounds of preemption and unconstitutionality decided previously in *Local 8-6* v. *State*[4] and also on two additional grounds stated in its brief[5] in the Supreme Court of Missouri, as follows:

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[3] *Division 1287, Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, AFL-CIO* v. *Dalton*, ... F. Supp. ..... (Not yet reported).

[4] (Mo. Sup. 1958) 317 S.W. 2d 309, *en banc*, vacated as moot, 316 U.S. 363, 80 S. Ct. 391, 4 L. ed. 373.

[5] Page 11, Brief for Appellants, Cause No. 49377 in the Supreme Court of Missouri, *en banc*. In the state trial court the points were argued by able counsel for the Union, in part as follows:

"If Your Honor please, as of course Your Honor is aware, the Supreme Court of Missouri, in State of Missouri versus Local No.

"(c) As applied in this case, the King-Thompson Act (*i*) operates extraterritorially, and therefore conflicts with the constitutional requirement that a state confine its authority within its own borders and (*ii*) directly regulates interstate commerce, and therefore

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8-6, Oil, Chemical and Atomic Workers International Union has passed for its purposes on the King-Thompson Act. It has ruled that the King-Thompson Act is not pre-empted by the Taft-Hartley Act. It has also ruled it is not vulnerable to attack on the 1st and 14th Amendment grounds. It would be pointless for us to argue to Your Honor in view of that decision that these questions are still open before you so on those questions I simply want to state we are preserving those points but do not argue them to Your Honor.

"There are two additional points which in our view are not foreclosed by the decision of the Missouri Supreme Court and which we do address to Your Honor. The first is the question of the existence of a state of jeopardy to interest, health and safety within the meaning of the King-Thompson Act. In the decision of the Supreme Court of Missouri in the Oil, Chemical and Atomic Workers case, the Supreme Court noted as follows: 'It is quite clear that the patrons of Laclede Gas Company were not furnished with safe and adequate service after the strike began. The strike had been in progress for five days before the Governor exercised his emergency powers and it was four days later before the State filed suit. The evidence demonstrates concludedly that the public health, safety and interest was jeopardized and that the Governor had reasonable cause to take action.'

"In our view on the record in this case there was no reasonable cause to take action. All that the record establishes by way of jeopardy is that there would be a reduction in the retail sales in the downtown Missouri area. We hardly think that a reduction in the retail sales in the downtown Missouri area constitutes jeopardy to interest, health and safety within the meaning of the King-Thompson Act.

"I think that the point we want to make was epitomized in the testimony of Mr. Austin who stated that the $5.00 sale of a tie you do not make today you do not make. That may be true, I rather doubt it, but whether or not you make it, you do not jeopardize interest, health and safety by not making that sale. That is all

offends the Commerce Clause of the United States Constitution independently of implementing legislation by Congress.

"(d) The actual or threatened strike against the Company did not jeopardize the 'public interest, health and welfare' within the meaning of the King-Thompson Act."

In moving in the Supreme Court of Missouri for summary affirmance[6] the Union attempted to withdraw these additional questions on which the Missouri Supreme Court has not previously expressed itself.

Ruling Staying Cause
Pending Determination of State Court Action

The defendant State officials have moved this Court to dismiss or to stay this action on the doctrine of abstention.

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that this evidence shows concrete with respect to an effect upon the community.

"I think the testimony of the Mayor was quite accurate. Substantial inconvenience no doubt would result but substantial inconvenience is not jeopardy to interest, health and safety. His Honor told us that the hospitals would continue to function, the police stations would continue to operate, public utilities would continue to function, industrial plants would continue to work. That is all that one can expect in a contemporary community if the right to strike is to be preserved at all. And the King-Thompson Act does not purport to destroy the right to strike, it purports to regulate public utilities when there is a strike. On this record there is no such showing.

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"Kansas City Transit, Inc., operates in Kansas and Missouri. There is no constitutional power in the State of Missouri to enjoin a strike against the Kansas City Transit, Inc., without the State of Missouri. The State of Missouri has no power to have its statutes operate extraterritorially."

[6] To save time in perfecting an appeal to the Supreme Court of the United States.

The Union opposes this motion and has moved for summary judgment on the merits. We have decided to stay this proceeding until the final determination of state court action now pending on the appeal submitted to the Supreme Court of Missouri. This decision includes deferring decision on plaintiff's motion for summary judgment. The reasons for this discretionary ruling follow.

Where (1) unsettled questions of state law are enmeshed with federal questions in determining the validity and constitutionality of a state law or of state action,[7] and (2) the state law problems are delicate ones, resolution of which is not without substantial difficulty,[8] proper exercise of federal jurisdiction requires that the controversy be decided in the state tribunal preliminary to a federal court's consideration of the underlying federal questions, usually a federal constitutional question.[9] This is the "doctrine of abstention.". The doctrine is not founded upon lack of power or jurisdiction but upon a sound judicial discretion

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[7] *Railroad Commission* v. *Pullman*, 312 U.S. 496, 61 S. Ct. 643, 85 L. ed. 971; *Spector Motor Service, Inc.* v. *McLaughlin*, 326 U.S. 101, 65 S. Ct. 152, 89 L. ed. 101; *Meridian* v. *Southern Bell Telephone Co.*, 358 U.S. 639, 79 S. Ct. 455, 3 L. ed. 2d 562.

[8] *Meridian* v. *Southern Bell Telephone Co.*, 358 U.S. 639, 79 S. Ct. 455, 3 L. ed. 2d 562.

[9] *Railroad Commission* v *Pullman*, 312 U.S. 496, 61 S. Ct. 643, 85 L. ed. 971; *United Gas Pipe Line Co.* v. *Ideal Cement Co.*, 369 U.S. 134, 82 S. Ct. 676, 7 L. ed. 2d 623; *Chicago, Burlington & Quincy R. Co.* v. *City of North Kansas City* (C.A. 8) 276 F. 2d 932, l.c. 937-940; Annotations 94 L. ed. 879 and 3 L. ed. 2d 1827; 1A Moore's *Federal Practice*, ¶ 0.203, p. 2101, *et seq.*; 1 Barron & Holtzoff, *Federal Practice and Procedure*, § 64, p. 339 *et. seq.* In *Alabama State Federation of Labor* v. *McAdory*, 325 U.S. 450, 65 S. Ct. 1384, 89 L. ed. 1725, the doctrine was applied by the Supreme Court of the United States in dismissing *certiorari* to review an Alabama Supreme Court decision in a declaratory judgment action challenging the validity of a state statute regulating labor unions.

of the District Court to decline to exercise jurisdiction in a proper case.[10] It is applicable in cases of federal juris-

[10] *Louisiana Power & Light Co.* v. *Thibodaux*, 360 U.S. 25, 79 S. Ct. 1070, 3 L. ed. 2d 1058. See also Kurland, *The Federal Court Abstention Doctrine*, 24 F.R.D. 481. It is not necessary to determine the soundness of the defendants' contention that § 2283, Title 28, U.S.C. deprives the Court of jurisdiction to grant the relief sought by the Union in this case. The provision relied on reads as follows:

"A court of the United States may not grant an injunction to stay proceedings in a State Court except as expressly authorized by Act of Congress or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

The defendants and *amici curiae* contend that this statute forbids the issuance of the injunction or the entry of declaratory judgment sought by the Union, regardless of the principles of the doctrine of abstention, citing *inter alia*, *Oklahoma Packing Co.* v. *Oklahoma Gas & Electric Co.*, 309 U.S. 4, 60 S. Ct. 215, 84 L. ed. 536; *H. J. Heinz Co.* v. *Owens* (C.A. 9) 189 F. 2d 505, *reh. den.* 189 F. 2d 505, *cert. den.* 342 U.S. 905, 72 S. Ct. 294, 96 L. ed. 677. Furthermore, on the application of the abstention doctrine in a case involving a claim of preemption, the defendants rely on a 1955 decision adopted by a 5-3 vote of the Supreme Court of the United States, with Mr. Justice Harlan not voting. *Amalgamated Clothing Workers of America* v. *Richman Brothers*, 348 U.S. 511, 75 S. Ct. 452, 99 L. ed. 600. Only Mr. Justice Frankfurter and Mr. Justice Clark of the five man majority remain on the Court. All dissenters and Mr. Justice Harlan remain. Whether this opinion would be followed today is not known. The question is annotated in 99 L. ed. 614. The dual problem of the application of the abstention doctrine and of the restrictions of § 2283 were discussed in *Leiter Minerals* v. *U.S.*, 352 U.S. 220, 77 S. Ct. 287, 1 L. ed. 2d 267. In a case similar to this involving a New Jersey statute, the Court granted a stay to the state officials, against whom an injunction was sought. *Traffic Telephone Workers Federation* v. *Driscoll*, restraining order granted, 71 F. Supp. 681, injunction denied and stay granted, 72 F. Supp. 499, appeal dismissed 332 U.S. 833, 68 S. Ct. 221, 92 L. ed. 406.

We hold that the doctrine of abstention applies in this case, considered apart from § 2283. Application of defendants' construction of § 2283 would also warrant the denial of the relief sought by the Union.

diction not involving charges of violation of the Federal Constitution.[11] Therefore, the doctrine of abstention is applicable in this case whether the question of preemption be considered a constitutional question or a question of statutory construction.

In essence, the doctrine of abstention arose from federal policies of avoiding unnecessary decisions, of avoiding presumptuous and possibly erroneous first constructions of state statutes, and of avoiding needless friction between the federal and state systems. These themes recur in the many cases applying and refusing to apply the doctrine.

If anything prevents a prompt state court determination, this Court retains the power to take appropriate action necessary for a just disposition of this litigation.[12]

It has been suggested that because this case was filed before the state court action, that the doctrine of abstention does not apply. This contention is not supported by reason or precedent. The application of the doctrine does not depend upon the result of a race to the state and federal courthouses. It may be applicable where the state court suit is filed after the federal action is filed[13] or even where the state court suit has not been, but can be, filed.[14]

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[11] *Thompson* v. *Magnolia Petroleum Co.*, 309 U.S. 478, 60 S. Ct. 628, 84 L. ed. 876; *Clay* v. *Sun Ins. Office Ltd.*, 363 U.S. 207, 80 S. Ct. 1222, 4 L. ed. 2d 1170; 1 Barron & Holtzoff, *Federal Practice and Procedure*, § 64 (Supp. 1962, pp. 69-70); 1A Moore, *Federal Practice*, ¶ 0.203 (2), p. 2115.

[12] *Louisiana Power & Light Co.* v. *Thibodaux*, 360 U.S. 25, 79 S. Ct. 1070, 3 L. ed. 2d 1058.

[13] *City of Chicago* v. *Fieldcrest Dairies*, 316 U.S. 168, 62 S. Ct. 986, 86 L. ed. 1355.

[14] *Clay* v. *Sun Ins. Office Ltd.*, 363 U.S. 207, 80 S. Ct. 1222, 4 L. ed. 2d 1170; *Chicago, Burlington & Quincy R. Co.* v. *City of North Kansas City* (C.A. 8) 276 F. 2d 932; Annotation 3 L. ed. 2d 1827.

In the case at bar, two unsettled questions of state law have been litigated in the Jackson County Circuit Court. These are the questions of extraterritoriality and propriety of the Governor's proclamation when considered in light of the actual facts. The Union has attempted to "withdraw" these litigated questions from consideration by the Supreme Court of Missouri.

In Missouri the scope of review cannot be regulated by an appellant, particularly in non-jury cases. The Supreme Court of Missouri has the power, ordinarily exercised, to pass upon all legal and factual issues presented by the record and to render such judgment as the trial court should have rendered. The review is *de novo* on the record made in the trial court.[15]

We have given consideration to the limitations on the doctrine of abstention reviewed in the authorities cited herein, and in plaintiff's brief, but find them inapplicable here.[16]

We accept the statement of the nature of the doctrine as an extraordinary and narrow exception to the duty of

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[15] Missouri Civil Rule 73.01(d); *Hubert* v. *Magidson* (Mo. Sup. 1951) 243 S.W. 2d 337, l.c. 341; *Milanko* v. *Austin* (Mo. Sup. 1951) 241 S.W. 2d 881, where there were no sufficient assignments of error by appellant. Furthermore, in this case, *amici curiae* have raised and briefed the unsettled questions which the Missouri Supreme Court may consider in cases of public interest such as this. *State* v. *Smith* (Mo. Sup. 1945) 184 S.W. 2d 598, l.c. 600, *en banc*.

[16] This Court is indebted to counsel for the Union, to counsel for the State and to Counsel for *amici curiae* for splendid briefs and arguments. The oral argument of Bernard Dunau, Esquire, of Washington, D.C., for the Union was excellent. The Union's briefs are exceptionally well organized, clear and comprehensive. Counsel for the defendant State officials and counsel for *amici curiae* have presented equally forceful arguments and briefs which would be expected of such experienced and able advocates.

a District Court to adjudicate a controversy before it.[17] We are conscious of the need for exceptional circumstances to justify invocation of the doctrine.

We find present in this case the following principal exceptional circumstances, *inter alia*, on which we base the action in this case:

(1) Presence of two substantial unsettled questions of state law, either of which, if resolved against the state, will make this case moot.

(2) Unusual speed in processing the state court case to the point of submission of the appeal.

(3) Cooperation of state officers in expediting the state court case, including suspension of the ordinary rules of oral argument and submission.

(4) Desirability of avoiding needless friction between the state and federal officials and courts in a sensitive area of great public concern.

(5) Undoubted confidence in the sincerity and good faith of the officials and counsel of Missouri.[18]

These, among other factors, have appealed to our discretion to exercise the power of abstention.

For the reasons we have stated, the defendants' motion to stay this proceeding is sustained and the defendants' motion to dismiss is overruled. Decision on plaintiff's motion for summary judgment is deferred.

IT IS SO ORDERED.

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[17] *County of Allegheny* v. *Frank Mashuda Co.*, 360 U.S. 185, 79 S. Ct. 1060, 3 L. ed. 2d 1163; *Meredith* v. *Winter Haven*, 320 U.S. 228, 64 S. Ct. 7, 88 L. ed. 9.

[18] And in the sincerity and good faith of the Union officials and Union counsel.

APPENDIX D

THE KING-THOMPSON ACT

Chapter 295, RSMo 1949

PUBLIC UTILITY LABOR DISPUTES
MEDIATION AND SEIZURE

295.010. *Labor relations affecting public utilities—state policy.*—It is hereby declared to be the policy of the state that heat, light, power, sanitation, transportation, communication, and water are life essentials of the people; that the possibility of labor strife in utilities operating under governmental franchise or permit or under governmental ownership and control is a threat to the welfare and health of the people; that utilities so operating are clothed with public interest, and the state's regulation of the labor relations affecting such public utilities is necessary in the public interest. (L. 1947 V. I p. 358 § 1)

295.020. *Definitions.*—1. The term "*public utility*" shall include any person engaged in the business of producing, distributing, selling or otherwise furnishing electric light or power, heat, gas, steam, water, sewer service, transportation excepting railroads, communication, or any one or more of them to the people of Missouri.

2. The term "*person*" means any individual, firm, copartnership, corporation, municipal corporation, company, association, or joint-stock association; and includes any trustee, receiver, assignee, or personal representative thereof.

3. The term "*representative*" means any person or persons, labor union, organization, or corporation designated either by a utility or group of utilities or by its or their employees to act or do for them.

4. The term "*collective bargaining*" shall be understood to embody the philosophy of bargaining by employees through representatives of their own choosing, and shall

include the right of representatives of employees' units to be consulted and to bargain upon the exceptional as well as the routine wages, hours, rules, and working conditions.

5. The term "*labor dispute*" shall involve any controversy between employer and employees as to hours, wages, and working conditions. The fact that employees have amicable relations with their employers shall not preclude the existence of a dispute among them concerning their representative for collective bargaining purposes.

6. The term "*employee*" shall refer to anyone in the service of another, actually engaged in or connected with the operation of any public utility throughout the state.

7. The term "*board*" shall mean the state board of mediation. (L. 1947 V. I p. 358 § 2)

295.030. *Governor to appoint state board of mediation—members—qualifications—terms—vacancy.*—1. Within thirty days after the effective date of this chapter the governor, by and with the advice and consent of the senate, shall appoint five competent persons to serve as a state board of mediation; two of whom shall be employers of labor, or selected from some association representing employers of labor, and two of whom shall be employees holding membership in some bona fide trade or labor union; the fifth shall be some person who is neither an employee nor an employer of labor and who shall be chairman of said state board of mediation.

2. Two members of said board shall be appointed for one year, two for two years, and one for three years, and all appointments thereafter shall be for three years or until their respective successors are appointed in the manner herein provided.

3. If a vacancy occurs in said board by death or otherwise, at any time, the governor shall appoint some compe-

tent person having the same qualifications as his predecessor to fill the unexpired term. (L. 1947 V. I p. 358 § 3).

295.040. *Oath of members—main office—meetings.*—Each member of said board shall, before entering upon the duties of his office, take and subscribe an oath to support the Constitution of the United States and this state and to demean himself faithfully in his office. The main office of the state board of mediation shall be in Jefferson City, but the board may hold meetings at any time or any place in the state whenever the same shall become necessary, and three members of the board shall constitute a quorum for the transaction of business. (L. 1947 V. I p. 358 § 4)

295.050. *Duties of chairman.*—The chairman of the board shall devote his full time to his duties and shall have charge of the office of the board. He shall keep all records of the proceedings of the board, and shall supervise the work of the employees of the board, and shall have such other powers and duties as may be conferred, or imposed upon him by the board. (L. 1947 V. I p. 358 § 5)

295.060. *Compensation and expenses of board members.*—The chairman of the board shall receive a salary of five thousand dollars per annum, payable monthly; each of the other members of the state board of mediation shall receive fifteen dollars per day for the time spent in the performance of their duties. All members shall receive traveling and other expenses incurred in the performance of their duties. (L. 1947 V. I p. 358 § 6)

295.070. *Powers and duties of board.*—1. The state board of mediation shall have power to employ and fix the compensation of conciliators and other assistants and to delegate to such assistants such powers as may be necessary to carry out its duties under this chapter. The board shall by regulation prescribe the methods of procedure before it.

2. The board shall have power to issue subpoenas requiring the attendance and testimony of witnesses and the pro-

duction of evidence which relates to any matter under investigation by the board. In cases of refusal to obey a subpoena issued by the board the circuit court of Cole county or of any county where the person refusing to obey such subpoena may be found, on application by the board, shall have power to issue an order requiring such person to appear before the board and to testify and produce evidence ordered touching the matter under investigation, and any failure to obey such order shall be punished by the court as a contempt thereof. (L. 1947 V. I p. 358 § 7)

295.080. *Labor disputes—action by board.*—1. Upon receipt of notice of any labor dispute between parties subject to this chapter, the board shall require such parties to keep it advised as to the progress of negotiations therein.

2. Upon application of either party to a labor dispute or upon its own motion the board may fix a time and place for a conference between the parties to the dispute and the board or its representative, upon the issues involved in the labor dispute and shall take whatever steps it deems expedient to bring about a settlement of the dispute including assisting in negotiating and drafting a settlement agreement.

3. It shall be the duty of all parties to a labor dispute to respond to the summons of the board for joint or several conferences with it or with its representatives and to continue in such conference until excused by the board or its representative. (L. 1947 V. I p. 358 §8)

295.090. *Labor agreements—renewal.*—All collective bargaining labor agreements hereafter entered into between the management of a utility and its employees or any craft or class of employees shall be reduced to writing and continue for a period of not less than one year from the date of the expiration of the previous agreement entered into between the management of the utility and its employees or if there has been no such previous agreement then for a period of not less than one year from the date of the actual

execution of the agreement. Such agreement shall be presumed to continue in force and effect from year to year after the date fixed for its original termination unless either or both parties thereto inform the other, in writing, of the specific changes desired to be made therein and shall also file a copy of such demands with the state board of mediation, at least sixty days before the original termination date of sixty days before the end of any yearly renewal period, or sixty days before any termination date desired thereafter. (L. 1947 V. I p. 358 § 10)

Sec. 295.100. *Changes in Labor Agreement—Notice.*—1. In the case of all existing labor contracts, agreements or understandings which do not provide for at least a sixty-day notice of desired changes and which contracts, agreements or understandings terminate after seventy days following the effective date of this chapter, the parties thereto shall nevertheless inform, in writing, the other party or parties of any specific changes desired to be made in said contract, agreement or understanding and file a copy of such desired changes with the state board of mediation at least sixty days before the date fixed for the termination of said contract, agreement or understanding.

2. In the case of labor contracts, agreements or understandings terminating within seventy days after this chapter shall become effective, the parties thereto shall forthwith, or not later than ten days after the effective date of this chapter, inform the other party, in writing, of the specific changes desired to be made in said contract, agreement or understanding and promptly file a copy of such demands with the state board of mediation.

Sec. 295.110. *Changes in Employment Terms in Absence of Labor Contract.*—Whenever, after the effective date of this chapter, a situation exists in any utility whereby employees are rendering services under terms and conditions which were not at the time this chapter becomes effective and which have not heretofore been the subject of the con-

tract, and said employees desire to effectuate a change in the terms of employment or a utility desires to effectuate a change in said terms of employment, then and in that event, it shall be the duty of the party desiring such change, not less than sixty days prior to the desired effective date thereof, to inform the other party in writing of the specific changes so desired in the manner in which they are desired, either by written contract or otherwise and to file a copy of such terms with the state board of mediation.

295.120. *Public hearing panel—members—powers—hearings.*—1. In the event that management of a utility and the representatives for collective bargaining purposes of any craft or group of employees of such utility shall not have reached and executed a final agreement in writing as to all conditions of employment affecting such employees on or before the termination date of any existing contract, agreement or understanding or any renewal thereof, or unless the parties shall have, before said date, agreed to submit any and all disputes between them to arbitration, the management of such utility and the representatives of such employees shall, within five days after such termination date, each designate, in writing, a person as a public hearing panel member and file such designation with the state board of mediation; the two persons so designated shall choose a third disinterested and impartial person and these three shall compose and act as a panel.

2. The panel shall promptly proceed and within fifteen days following their designation hold and complete public hearings on the specific changes so requested, to the contract, agreement or understanding. Said period of fifteen days may be extended by the mutual written consent of the parties. The panel shall give to each party full notice and opportunity to be heard, but the failure of either party to appear before the panel at the time and place fixed by it shall not deprive the panel of jurisdiction to proceed to

a hearing and to make report thereon as herein provided. (L. 1947 V. I p. 358 *14)

295.130. *Appearance in person or by counsel—notice of hearing.*—Parties may be heard either in person or by counsel as they may elect, and the panel shall give due notice of all hearings to the employee or employees or their representatives and the public utility or utilities involved in the labor dispute. (L. 1947 V. I p. 358 § 15)

295.140. *Selection of party representatives.*—Representatives for the purposes of this chapter shall be designated by the respective parties without interference, influence or coercion by either party over the designation of representatives by the other. Representatives of employees for the purpose of this chapter need not be persons in the employ of the utility. (L. 1947 V. I p. 358 § 16)

295.150. *Report of hearing to governor.*—Within five days after closing such hearings the panel shall file with the governor, in writing, a report setting forth a statement of the controversy, a resume of the evidence submitted to it and its recommendations based thereon. (L. 1947 V. I p. 358 § 17)

295.160. *Appointment of representatives by board when not designated by parties.*—1. In the event either management of the utility involved or the representatives of the employees for collective bargaining purposes shall fail or neglect to designate, as herein provided, such a person to represent it upon the panel or the two so designated shall fail to agree upon the third member of the panel, within ten days after the date fixed for the termination of such contract, agreement or understanding or upon failure to file such designations or any of them with the state board of mediation within said ten-day period, the state board of mediation shall appoint such person or persons, selecting in each case a person qualified by previous experience or employment to represent employers, employees or the public as the case may require.

2. Should both management and the representatives of the employees fail or neglect to designate representatives upon said panel within the time herein required, then the state board of mediation shall appoint a panel of three persons, to be selected as follows: one to represent management of the utility, giving the management forty-eight hours to select its preference from a list of five persons submitted by the board to the management before designating such person; one to represent the employees involved, giving their representative forty-eight hours to select their preference from a list of five persons submitted by the board to such representative, before designating such person; and one to act as the impartial third person. Failure on the part of either party to make such selection shall not prevent the board from appointing the members of the panel from the lists submitted. (L. 1947 V. I p. 358 § 18)

295.170. *Proceedings Not to Supersede Voluntary Arbitration.*—Compulsory arbitration, as provided in this chapter shall not be effective in disputes where voluntary arbitration is a part of the contract between the disputing parties. In the event that through the voluntary arbitration disputing parties cannot agree, the state board of mediation shall then enforce the compulsory arbitration as provided.

295.180. *Utility strike—power of governor.*—1. Should either the utility or its employees refuse to accept and abide by the recommendations made pursuant to the provisions of this chapter and as a result thereof the effective operation of a public utility be threatened or interrupted, or should either party in a labor dispute between a utility and its employees, after having given sixty days' notice thereof, or failing to give such notice, engage in any strike, work stoppage or lockout which, in the opinion of the governor, will result in the failure to continue the operation of the public utility, and threatens the public interest, health and welfare, or in the event that neither side has given notice

to the other of an intention to seek a change in working conditions, and there occurs a lockout, strike or work stoppage which, in the opinion of the governor, threatens to impair the operation of the utility so as to interfere with the public interest, health and welfare, then and in that case he is authorized to take immediate possession of the plant, equipment or facility for the use and operation by the state of Missouri in the public interest.

2. Such power and authority may be exercised by the governor through such department or agency of the government as he may designate and may be exercised after his investigation and proclamation that there is a threatened or actual interruption of the operation of such public utility as the result of a labor dispute, a threatened or actual strike, a lockout or other labor disturbance, and that the public interest, health and welfare are jeopardized, and that the exercise of such authority is necessary to insure the operation of such public utility; provided, that whenever such public utility, its plant, equipment or facility has been or is hereafter so taken by reason of a strike, lockout, threatened strike, threatened lockout, work stoppage or slowdown, or other cause, such utility, plant, equipment or facility shall be returned to the owners thereof as soon as practicable after the settlement of said labor dispute, and it shall thereupon be the duty of such utility to continue the operation of the plant facility, or equipment in accordance with its franchise and certificate of public convenience and necessity. (L. 1947 V. I p. 358 § 19)

295.190. *Governor to prescribe rules and regulations.*—The governor is authorized to prescribe the necessary rules and regulations to carry out the provisions of this chapter. (L. 1947 V. I p. 358 § 20)

295.200. *Unlawful acts—penalties—enforcement of provision.*—1. It shall be unlawful for any person, employee, or representative as defined in this chapter to call, incite,

support or participate in any strike or concerted refusal to work for any utility or for the state after any plant, equipment or facility has been taken over by the state under this chapter, as means of enforcing any demands against the utility or against the state.

2. It shall be unlawful for any public utility to employ any person or employee who has violated paragraph 1 of this section except that such person or employee may be employed only as a new employee.

3. Any labor organization or labor union which violates paragraph 1 of this section shall forfeit and pay to the state of Missouri for the use of the public school fund of the state, the sum of ten thousand dollars for each day any work stoppage resulting from any strike which it has called, incited, or supported, continues, to be recovered by civil action in the name of the state and against the labor organization or labor union in its commonly used name.

4. Any officer of any labor organization or labor union representing employees of public utilities who participates in calling, inciting or supporting any strike in violation of paragraph 1 of this section shall forfeit and pay to the state of Missouri, for the use of the public school fund of the state, the sum of one thousand dollars to be recovered by civil action in the name of the state and against such officer.

5. Any public utility that engages in a lockout which brings about a work stoppage shall forfeit and pay to the state of Missouri, for the use of the public school fund of the state, the sum of ten thousand dollars for each day of work stoppage caused by such lockout, said amount to be recovered by civil action in the name of the state and against the public utility; provided further, that if, upon any investigation, supported by competent evidence, by the state board of mediation, it shall appear that any public

utility has refused to bargain collectively in good faith with its employees over the terms and conditions of employment, said state board of mediation shall certify such record and proceedings to the public service commission, and, upon consideration of the facts in such record and proceedings the public service commission shall find that the evidence justifies such action, it may revoke the certificate of convenience and necessity of such public utility, or impose such other conditions upon such public utility as may be provided by law. Any such action by said public service commission shall be subject to review in the courts of this state in the same manner as other orders or decisions of said commission.

6. The courts of this state shall have power to enforce by injunction or other legal or equitable remedies any provision of this chapter or any rule or regulation prescribed by the governor hereunder. (L. 1947 V. I p. 358 § 21)

295.210. *Meaning of law.*—No employee shall be required to render labor or service without his consent; nor shall anything in this chapter be construed to make the quitting of his labor or services by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service without his consent. (L. 1947 V. I p. 358 § 22)

APPENDIX E

Excerpts From Labor Management Relations Act, 1947 (61 Stat. 136, 29 U.S.C. § 141, et seq.)

SHORT TITLE AND DECLARATION OF POLICY

SECTION 1. (a) This Act may be cited as the "Labor Management Relations Act, 1947".

(b) Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.

It is the purpose and policy of this Act, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.

TITLE I—AMENDMENT OF NATIONAL LABOR RELATIONS ACT

SEC. 101. The National Labor Relations Act is hereby amended to read as follows:

FINDINGS AND POLICIES

SECTION 1. The denial by some employers of the right of employees to organize and the refusal by some employers

to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening

or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

* * *

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

* * *

SEC. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

* * *

TITLE II—CONCILIATION OF LABOR DISPUTES IN INDUSTRIES AFFECTING COMMERCE; NATIONAL EMERGENCIES

* * * *

FUNCTIONS OF THE [FEDERAL MEDIATION AND CONCILIATION] SERVICE

SEC. 203. (a) It shall be the duty of the Service, in order to prevent or minimize interruptions of the free flow of commerce growing out of labor disputes, to assist parties to labor disputes in industries affecting commerce to settle such disputes through conciliation and mediation.

(b) The Service may proffer its services in any labor dispute in any industry affecting commerce, either upon its own motion or upon the request of one or more of the parties to the dispute, whenever in its judgment such dispute threatens to cause a substantial interruption of commerce. The Director and the Service are directed to avoid attempting to mediate disputes which would have only a minor effect on interstate commerce if State or other conciliation services are available to the parties. Whenever the Service does proffer its services in any dispute, it shall be the duty of the Service promptly to put itself in communication with the parties and to use its best efforts, by mediation and conciliation, to bring them to agreement.

(c) If the Director is not able to bring the parties to agreement by conciliation within a reasonable time, he shall seek to induce the parties voluntarily to seek other means of settling the dispute without resort to strike, lock-out, or other coercion, including submission to the employees in the bargaining unit of the employer's last offer of settlement for approval or rejection in a secret ballot. The failure or refusal of either party to agree to any procedure suggested by the Director shall not be deemed a violation of any duty or obligation imposed by this Act.

* * * *

NATIONAL EMERGENCIES

SEC. 206. Whenever in the opinion of the President of the United States, a threatened or actual strike or lock-out affecting an entire industry or a substantial part thereof engaged in trade, commerce, transportation, transmission, or communication among the several States or with foreign nations, or engaged in the production of goods for commerce, will, if permitted to occur or to continue, imperil the national health or safety, he may appoint a board of inquiry to inquire into the issues involved in the dispute and to make a written report to him within such time as he shall prescribe. Such report shall include a statement of the facts with respect to the dispute, including each party's statement of its position but shall not contain any recommendations. The President shall file a copy of such report with the Service and shall make its contents available to the public.

SEC. 207. (a) A board of inquiry shall be composed of a chairman and such other members as the President shall determine, and shall have power to sit and act in any place within the United States and to conduct such hearings either in public or in private, as it may deem necessary or proper, to ascertain the facts with respect to the causes and circumstances of the dispute.

* * *

SEC. 208. (a) Upon receiving a report from a board of inquiry the President may direct the Attorney General to petition any district court of the United States having jurisdiction of the parties to enjoin such strike or lock-out or the continuing thereof, and if the court finds that such threatened or actual strike or lock-out—

(i) affects an entire industry or a substantial part thereof engaged in trade, commerce, transportation, transmission, or communication among the several States or with foreign nations, or engaged in the production of goods for commerce; and

(ii) if permitted to occur or to continue, will imperil the national health or safety, it shall have jurisdiction to enjoin any such strike or lock-out, or the continuing thereof, and to make such other orders as may be appropriate.

* * *

SEC. 209. (a) Whenever a district court has issued an order under section 208 enjoining acts or practices which imperil or threaten to imperil the national health or safety, it shall be the duty of the parties to the labor dispute giving rise to such order to make every effort to adjust and settle their differences, with the assistance of the Service created by this Act. Neither party shall be under any duty to accept, in whole or in part, any proposal of settlement made by the Service.

(b) Upon the issuance of such order, the President shall reconvene the board of inquiry which has previously reported with respect to the dispute. At the end of a sixty-day period (unless the dispute has been settled by that time), the board of inquiry shall report to the President the current position of the parties and the efforts which have been made for settlement, and shall include a statement by each party of its position and a statement of the employer's last offer of settlement. The President shall make such report available to the public. The National Labor Relations Board, within the succeeding fifteen days, shall take a secret ballot of the employees of each employer involved in the dispute on the question of whether they wish to accept the final offer of settlement made by their employer as stated by him and shall certify the results thereof to the Attorney General within five days thereafter.

SEC. 210. Upon the certification of the results of such ballot or upon a settlement being reached, whichever happens sooner, the Attorney General shall move the court to discharge the injunction, which motion shall then be granted and the injunction discharged. When such motion is granted,

the President shall submit to the Congress a full and comprehensive report of the proceedings, including the findings of the board of inquiry and the ballot taken by the National Labor Relations Board, together with such recommendations as he may see fit to make for consideration and appropriate action.